(34)

No. 06-100
Vide 06-82
Title: GEICO General Insurance Company, et al., Petitioners
v.
Ajene Edo
Docketed: July 24, 2006
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-35695, 04-35279)
Decision Date: January 25, 2006
Rehearing Denied: April 20, 2006

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 19 2006	Petition for a writ of certiorari filed. (Response due August 23, 2006)
Aug 15 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents.
Aug 16 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners,, Geico, et al.
Aug 21 2006	Brief amicus curiae of Mortgage Insurance Companies of America filed. VIDED.
Aug 21 2006	Brief amicus curiae of Property Casualty Insurers Association of America filed. VIDED.
Aug 21 2006	Brief amicus curiae of Financial Services Roundtable filed. VIDED.
Aug 21 2006	Brief amici curiae of American Insurance Association and National Association of Mutual Insurance Companies filed. VIDED.
Aug 21 2006	Brief amicus curiae of FreedomWorks Foundation filed. VIDED.
Aug 21 2006	Brief of respondent Ajene Edo in opposition filed. VIDED.
Aug 21 2006	Brief amici curiae of Chamber of Commerce of the United States and Business Roundtable filed. VIDED.
Sep 5 2006	Reply of petitioners GEICO General Insurance Company, et al. filed. (Distributed)
Sep 6 2006	DISTRIBUTED for Conference of September 25, 2006.
Sep 26 2006	Petition GRANTED. The case is consolidated with No. 06-84 and a total of one hour is allotted for oral argument.
Sep 28 2006	Consent to the filing of amicus briefs in support of either party received from counsel for petitioners GEICO Insurance Co, GEICO Indemnity Co., and Government Employees Insurance Co.
Sep 29 2006	Consent to the filing of amicus briefs in support of either party received from counsel for respondents Edo, Massey, and Burr.

Oct 31 2006 SET FOR ARGUMENT ON Tuesday, January 16, 2007.

Nov 13 2006 Brief amici curiae of Farmers Insurance Company of Oregon, et al. filed. VIDED.

Nov 13 2006 Joint appendix filed.

Nov 13 2006 Brief of petitioners GEICO General Insurance Company, et al. filed.

Nov 13 2006 Brief amicus curiae of Ford Motor Company filed. VIDED.

Nov 13 2006 Brief amici curiae of Mortgage Insurance Companies of America and Consumer Mortgage Coalition filed. VIDED.

Nov 13 2006 Brief amicus curiae of American Insurance Association filed. VIDED.

Nov 13 2006 Brief amicus curiae of Consumer Data Industry Association filed. VIDED.

Nov 13 2006 Brief amicus curiae of National Association of Mutual Insurance Companies filed. VIDED.

Nov 13 2006 Brief amicus curiae of FreedomWorks Foundation filed. VIDED.

Nov 13 2006 Brief amicus curiae of Property Casualty Insurers Association of America filed. VIDED.

Nov 13 2006 Brief amicus curiae of Washington Legal Foundation filed. VIDED.

Nov 13 2006 Brief amicus curiae of United States in support of reversal filed. VIDED.

Nov 13 2006 Brief amicus curiae of Trans Union LLC filed. VIDED.

Nov 14 2006 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.

Nov 14 2006 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Nov 17 2006 CIRCULATED.

Nov 30 2006 Record received from U.S.D.C. for District of Oregon. (4 boxes)

Dec 1 2006 Record received from U.S.C.A. for 9th Circuit. (1box)

Dec 11 2006 Application (06A572) to file a consolidated respondents' brief on the merits in excess of the page limitation., submitted to Justice Kennedy.

Dec 13 2006 Application (06A572) granted by Justice Kennedy to file a consolidated respondents' brief on the merits in excess of the page limitation.

Dec 18 2006 Brief amici curiae of National Consumer Law Center, Inc., et al. filed. VIDED. (Distributed)

Dec 18 2006 Brief amici curiae of Oregon, et al. filed. VIDED. (Distributed)

Dec 18 2006 Brief amici curiae of Insurance Commissioners of the States of Delaware, et al. filed. VIDED. (Distributed)

Dec 18 2006 Brief of respondent Ajene Edo filed. VIDED. (Distributed)

Dec 18 2006 Lodging request received from respondents. VIDED.

Jan 5 2007 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. VIDED.

Jan 5 2007 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Jan 9 2007	Reply of petitioners GEICO General Insurance Company, et al. filed. (Distributed)
Jan 16 2007	Argued. For petitioners: Maureen E. Mahoney, Washington, D.C.; and Patricia A. Millett, Assistant to the Solicitor General, Department of Jutice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Scott A. Schorr, Portland, Ore. Previous New

Supreme Court, U.S.
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No. 06- 06-100

IN THE

Supreme Court of the United States

GEICO GENERAL INSURANCE COMPANY,
GEICO INDEMNITY COMPANY, and
GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioners,

v.

AJENE EDO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT D. ALLEN*
MELONEY CARGIL PERRY
JAY F. UTLEY
BRANDON P. LONG
BAKER & MCKENZIE LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 978-3000

* *Counsel of Record*

Attorneys for Petitioners

202205

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

The Fair Credit Reporting Act ("FCRA" or the "Act") requires a user of consumer credit information to notify a consumer when the consumer has been treated adversely on the basis of his or her credit information. To enforce this requirement, Congress provided two tiers of civil remedies. Under § 1681o of the Act, if a consumer shows that a user's failure to send an adverse-action notice was negligent, the consumer is entitled to recover actual damages. But under § 1681n of the Act, if the consumer makes a higher showing and proves that the user's failure to send an adverse-action notice was "willful," the consumer is entitled to recover statutory damages between $100 and $1,000 (in lieu of actual damages) and punitive damages.

A conflict exists between the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, and the Third and (now) Ninth Circuits over the mens rea required for a "willful" violation of FCRA. Separating itself from any other circuit to have decided the issue and compounding the circuit split, the Ninth Circuit held that a company may be deemed to have acted recklessly—and thereby willfully under the Act—if the company relied, even in good faith, upon an interpretation of the Act that a court later determines to be "unreasonable[]," "implausible," "creative," or "untenable," even if that interpretation was derived from a legal opinion that the company sought for the very purpose of ensuring compliance with the law.

Two questions are presented:

1. Whether the Ninth Circuit's construction of "willfully" under § 1681n of FCRA impermissibly permits a finding of willfulness to be based upon nothing more than negligence, gross negligence, or a completely good-faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law, rather than requiring proof of a defendant's knowledge that its conduct violated FCRA or, at a minimum, recklessness in its subjective form?

2. Whether the Ninth Circuit improperly expanded § 1681m of FCRA by holding that an "adverse action" has occurred and notice is required thereunder, even when a consumer's credit information has had either no impact or a favorable impact on the rates and terms of the insurance that would otherwise have been offered or provided?

LIST OF PARTIES

Petitioners GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company were defendants in the district court proceedings and appellees in the court of appeals proceedings. GEICO Casualty Company was a defendant in the district court proceedings, but was not a party in the court of appeals proceedings and thus is not a party to this petition.

Respondent, Ajene Edo, was a plaintiff in the district court proceedings and the appellant in the court of appeals proceedings.

In the court of appeals, this case was consolidated for purposes of oral argument with another proceeding in which Jason Reynolds was the appellant and Hartford Fire Insurance Company was the appellee.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of Government Employees Insurance Company and GEICO Indemnity Company is GEICO Corporation. GEICO Corporation is an indirect subsidiary of Berkshire Hathaway. There is no publicly held corporation that owns ten percent or more of the stock in Government Employees Insurance Company or GEICO Indemnity Company.

The parent corporation of GEICO General Insurance Company is Government Employees Insurance Company. There is no publicly held corporation that owns ten percent or more of the stock in GEICO General Insurance Company.

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OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Reynolds v. Hartford Financial Services Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005). The first opinion was withdrawn, and a second opinion was issued on October 3, 2005, was amended on October 24, 2005, and is reported at 426 F.3d 1020 (9th Cir. 2005). The second opinion was also withdrawn, and a third opinion was issued on January 25, 2006, and is reported at 435 F.3d 1081 (9th Cir. 2006).[1] The Ninth Circuit reversed the February 23, 2004 decision of the United States District Court for the District of Oregon, which is reported at *Edo v. GEICO Casualty Co.*, No. 02-678-BR, 2004 U.S. Dist. LEXIS 28522 (D. Or. Feb. 23, 2004).[2]

STATEMENT OF JURISDICTION

The Ninth Circuit's opinion was entered on January 25, 2006.[3] Petitioners timely filed a Petition for Rehearing *En Banc*, which was denied on April 20, 2006.[4]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

STATUTES INVOLVED

Sections 602-603 and 615-617 of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, 1681a, and 1681m-1681o (2000), are set out in the Appendix at 51a. All references to the sections of FCRA or "the Act" are references to the *codified* sections of FCRA, which are contained in Title 15 of the United States Code.

STATEMENT OF THE CASE

Long after FCRA[5] was enacted in 1970, insurance companies began to widely use consumer credit information to help price their insurance policies. Insurance companies frequently rely on a consumer's "insurance score," which is derived in whole or in part from the consumer's credit information, to help predict the risk that the consumer will

[1](Petitioners' Appendix (hereafter "App.") at 1a.)
[2](App. at 37a.)
[3](App. at 1a.)
[4](App. at 49a.)
[5]15 U.S.C. §§ 1681-1681t (2000).

suffer a loss. FCRA allows insurance companies to use consumer credit information in this manner, but requires insurance companies to notify a consumer when the company treats the consumer "adversely" or "unfavorably" "on the basis of" the consumer's credit information. If an insurance company negligently fails to comply with this requirement, the company can be held liable for actual damages. Upon a higher showing of "willful" noncompliance, the company can be held liable for statutory damages between $100 and $1,000 (in lieu of actual damages) and punitive damages.

In the thirty-five years since FCRA was enacted, no federal appellate court has interpreted the terms "adversely," "adverse action," "unfavorably," or "on the basis of" in the insurance context – until now. And in the past thirty-five years, although the circuits have adopted conflicting interpretations of what constitutes a "willful" violation of FCRA, no circuit has adopted an "unreasonableness" standard for willfulness – until now. The decisions of district courts in the Ninth and other circuits reflect the confusion over the correct standard and confirm that the Ninth Circuit's holding involves recurring legal issues that have substantial importance, not just to the parties, but to insurance companies and consumers all across America as well.

In December of 2000, Respondent, Ajene Edo ("Edo"), called and requested a rate quote for automobile insurance from the GEICO family of companies.[6] GEICO requested Edo's insurance score from Trans Union. GEICO then offered Edo a policy with GEICO Indemnity Company, which he accepted. Because GEICO determined that Edo had received the exact same rate and terms for insurance that he would have received if his insurance score had not been ordered or used in any way, GEICO concluded that Edo had not suffered any "adverse action" as that term is defined in FCRA[7] and, therefore, did not send Edo an adverse-action notice.[8]

At the core of this putative class action is Edo's claim that GEICO willfully violated FCRA by failing to send him an

[6]Petitioners Government Employees Insurance Company, GEICO General Insurance Company, and GEICO Indemnity Company are collectively referred to herein as GEICO.

[7](Excerpts of Record in the Ninth Circuit (hereafter "ER") at 55, ¶ 11.)

[8](ER at 10, ¶ 10; 23, ¶ 8.)

adverse-action notice as required by § 1681m of the Act. On motion for summary judgment, the district court dismissed Edo's claims, concluding in relevant part—as GEICO had concluded—that Edo had not, in fact, suffered any adverse action and that no adverse-action notice was required because Edo had received the same rate and terms from the GEICO family of companies that he would have received if GEICO had not considered his credit information.

In an opinion authored by Judge Stephen Reinhardt, a three-judge panel of the Ninth Circuit reversed. The Ninth Circuit held, in part, that an adverse action occurs and notice is required under FCRA, not only when a consumer's credit information has an adverse or unfavorable impact on the insurance rates or terms that would otherwise have been offered or provided, but also when a consumer's credit information, if considered, would have had a more favorable impact on those rates or terms if that credit information had been more favorable.[9] Under this reasoning, an applicant for automobile insurance that is offered a discount because of her above-average credit information nonetheless would have suffered an "adverse action" at the hands of the insurer if an even better insurance score would have qualified her for an even greater discount.

The Ninth Circuit then turned to the issue of whether GEICO had "willfully" violated FCRA and should be punished with punitive damages. After acknowledging a circuit split over the mens rea required for a "willful" violation of FCRA, the Ninth Circuit purported to adopt the minority view and held that a company acts willfully if it acts in "reckless disregard" of whether its policy or action violates the rights of consumers. But the Ninth Circuit further defined its "reckless disregard" standard by holding that a company may be deemed to have acted recklessly if the company relies, *even in good faith*, on an interpretation of FCRA that is later determined to be "unreasonable[]," "implausible," "creative," or "untenable"—*even if that interpretation was derived from a legal opinion sought for the very purpose of ensuring compliance*

[9] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1093 (9th Cir. 2006). (App. at 20a-21a.)

with the law. Accordingly, the Ninth Circuit remanded in part for a determination of whether GEICO's or its counsel's interpretations of FCRA were so unreasonable or implausible as to permit a finding of willfulness on that basis alone, *even though the district court interpreted FCRA in the very same way in the proceedings below.*

1. Notice requirements under FCRA. FCRA authorizes insurance companies to use credit information as an underwriting tool, but it requires insurance companies using credit information to notify a consumer when the consumer's credit information has had an adverse impact on the rates or terms provided.[10] Section 1681m of FCRA provides in part: "If any person takes any *adverse action* with respect to any consumer that is *based in whole or in part on any information contained in a consumer report*, the person shall . . . provide oral, written, or electronic notice of the adverse action to the consumer . . . ."[11] In connection with insurance, FCRA defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other *adverse or unfavorable change* in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."[12]

If an insurance company fails to comply with § 1681m's requirements, the company may be subject to liability under one of FCRA's two tiers of civil liability. Section 1681o of the Act allows a plaintiff to recover actual damages for "negligent" violations, while § 1681n punishes "willful" violations by allowing a plaintiff to recover statutory damages between $100 and $1,000 (in lieu of actual damages), and punitive damages.[13] FCRA does not define the term "willfully," and this Court has never granted certiorari to define it under the Act.

2. Proceedings in the district court. Edo filed this putative class action in the United States District Court for the District of Oregon, invoking jurisdiction under FCRA[14] and

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[10]15 U.S.C. § 1681m(a)(1).

[11]*Id.* (emphasis added).

[12]15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

[13]*Compare* 15 U.S.C. § 1681o, *with* 15 U.S.C. § 1681n.

[14]*See* 28 U.S.C. § 1331 (2000).

alleging that he had suffered an adverse action because he had been offered insurance from GEICO Indemnity at a rate "less favorable" than the rate that would have been offered if he had had the highest, most-favorable insurance score. Although he seeks no actual damages, Edo alleges that GEICO's purported violations of FCRA were willful and that GEICO should be required to pay statutory damages of $100 to $1,000 per class member, and punitive damages.[15]

After discovery, GEICO moved for summary judgment, arguing in part that no GEICO entity could have violated FCRA because none of the GEICO entities had taken any adverse action against Edo. As an alternative basis for summary judgment, GEICO argued that Edo could not establish the required element of willfulness under § 1681n. GEICO argued that it had used its best efforts to comply with FCRA at all times and that, because the issue of what constitutes an "adverse action" in the context of insurance underwriting was an issue of first impression, it could not serve as the basis for finding a willful violation of FCRA.[16]

On February 23, 2004, without reaching GEICO's willfulness argument, the district court granted GEICO's Motion for Summary Judgment and dismissed Edo's claims against each of the GEICO entities, concluding that Edo had not, in fact, suffered any adverse action.[17] The district court dismissed Edo's claim against GEICO Indemnity because the court concluded that Edo had not suffered any adverse action on the basis of his credit information: "Plaintiff admits the premium charged to him by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."[18] Edo's claim against Government Employees Insurance Company was dismissed because Edo, who was not a government employee or in the military, was "not eligible for insurance coverage from Government Employees regardless of his

[15](*See* ER at 3-5, 81 Ans. to Interrog. 6.)

[16](Supplemental Excerpts of Record in the Ninth Circuit (hereinafter "SER") at 307-13.)

[17]*Edo v. GEICO Cas. Co.*, No. 02-678-BR, 2004 U.S. Dist. LEXIS 28522 (D. Or. Feb. 23, 2004). (App. at 37a.)

[18]*Id.* at *12. (App. at 46a.)

consumer score because Government Employees offers insurance coverage only to government employees or military personnel."[19] Edo's claims against the other GEICO entities were also dismissed.[20]

Pursuant to 28 U.S.C. § 1291, Edo filed his Notice of Appeal.[21]

3. Proceedings in the Ninth Circuit. On August 4, 2005, the Ninth Circuit, with one member of the panel dissenting, issued its first opinion, holding in relevant part that an adverse action has occurred and notice is required under § 1681m of the Act "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," even when that rate is lower than or equal to the rate he would have otherwise paid if his credit rating had not been considered.[22] The court then held that Edo had suffered an adverse action and that notice was required under FCRA because Edo had not received the very best rate that the GEICO family of companies had to offer.[23] After acknowledging a circuit split among the Third, Sixth, and Eighth Circuits regarding the mens rea required for a "willful" violation of FCRA, the panel majority purported to adopt a "reckless disregard" standard. But the panel majority then held, *sua sponte*, that GEICO's lawyer's interpretations of FCRA – interpretations adopted by the district court when it granted GEICO's Motion for Summary Judgment – were "unreasonable" and, consequently, that GEICO had "willfully" violated FCRA as a matter of law.[24] GEICO filed a Petition for Rehearing and Rehearing *En Banc*, arguing in part that the panel majority had adopted and applied a negligence standard for willfulness. GEICO also challenged the Ninth Circuit's interpretation of what constitutes an "adverse action" under the Act. Several amici curiae submitted briefs in support of GEICO's petition.

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[19] *Id.* at *10. (App. at 44a.)

[20] *Id.* at *10-13. (App. at 45a-47a.) Edo did not appeal the district court's dismissal of GEICO Casualty.

[21] (ER at 255.)

[22] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005).

[23] *See id.* at 1108-09.

[24] *Id.* at 1113-16.

On October 24, 2005, the Ninth Circuit withdrew its first opinion and issued a second opinion.[25] While the court did not change its interpretation of what constitutes an "adverse action" under § 1681m of the Act, the panel majority wordsmithed the willfulness section of its first opinion by replacing all references to the word "unreasonable" with the word "implausible" (which also means unreasonable[26]) or "untenable" or some other variation of these adjectives.[27] But the panel majority stood by its prior holding that GEICO had willfully violated FCRA as a matter of law because its lawyer's interpretations of the Act, with which the district court agreed, were "implausible" and "untenable."[28] GEICO then filed its First Amended Petition for Rehearing *En Banc*, arguing in part that the panel majority's restated willfulness standard focused not on a company's mens rea, good faith, or lack thereof, but, rather, on the correctness or incorrectness of the company's lawyer's interpretations of FCRA. Again, GEICO challenged the Ninth Circuit's interpretation of what constitutes an "adverse action." And once again, several amici curiae submitted briefs in support of GEICO's petition.

On January 25, 2006, the Ninth Circuit withdrew its second opinion, and issued its third and ultimately final opinion that is the subject of this Petition for a Writ of Certiorari.[29] As in the first two versions of its opinion, the panel again held in part that Edo had suffered an adverse action and that notice was required under FCRA.[30] The court again acknowledged the circuit split regarding the standard for determining willfulness, but abandoned the panel majority's prior *sua sponte* holding that GEICO had willfully violated FCRA as a matter of law. Nonetheless, the panel maintained its holding that a company may be found to have acted recklessly and thereby willfully, even if it diligently attempted to comply with FCRA

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[25]*Reynolds v. Hartford Fin. Servs. Group, Inc.*, 426 F.3d 1020 (9th Cir. 2005).

[26]*See* Merriam-Webster's Collegiate Dictionary 950 (11th ed. 2004).

[27]*Reynolds*, 426 F.3d at 1036-40.

[28]*Id.*

[29]*Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081 (9th Cir. 2006). (App. at 1a.)

[30]*Id.* at 1092-93. (App. at 20a-21a.)

but relied in good faith on an interpretation of the Act that is later determined to be "unreasonable[]," "implausible," "creative," or "untenable." The court then remanded for a determination of whether GEICO had acted willfully under this standard.[31] GEICO filed its Second Amended Petition for Rehearing *En Banc*, arguing in part that the panel has once again adopted, in effect, a negligence standard for willfulness, and has collapsed the statutory distinction between negligence and willfulness intended by Congress. Yet again, several amici curiae submitted briefs in support of GEICO's petition. The Ninth Circuit denied GEICO's petition on April 20, 2006.

REASONS FOR GRANTING THE PETITION

This case brings to this Court the perfect opportunity to resolve a clear conflict among at least the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits and to establish uniformity as to what constitutes a "willful" violation of FCRA that would entitle a plaintiff to statutory and punitive damages. Although this Court has granted certiorari on numerous other occasions to define the term "willfully" as it is used in other federal statutory schemes, the Court has never granted certiorari to define the term as it is used in FCRA. While purporting to adopt a "reckless disregard" standard for determining willfulness under FCRA, the Ninth Circuit went further and held that a company may be deemed to have acted willfully and thereby subjected to massive statutory and punitive damages if the company relied, *even in good faith*, on an interpretation of the Act that is later determined to be "unreasonable[]," "implausible," "creative," or "untenable" – *even if that interpretation was derived from a legal opinion that the company sought for the purpose of ensuring compliance with the law*. In effect, the Ninth Circuit has adopted the very same willfulness standard that this Court rejected in another context because it would "permit a finding of willfulness to be based on nothing more than negligence, or perhaps, on a completely good-faith but incorrect assumption" that the company's policies and actions were in compliance with the law.[32] Given the confusion created by the existing circuit split and now the

[31] *Id.* at 1097-99. (App. at 31a-34a.)

[32] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988).

Ninth Circuit's new willfulness standard, which blurs if not collapses the two-tiered statutory distinction between negligence and willfulness, the issue is urgently in need of this Court's authoritative voice. There are class-action proceedings[33] and Multi-District Litigation proceedings pending[34] all across the country wherein plaintiffs have alleged willful violations of FCRA and seek literally *billions* of dollars in statutory and punitive damages. Thus, in addition to resolving the conflict among the circuits, granting review at this time will promote the efficient management of these other cases that are currently before the federal courts.

The willfulness standard adopted by the Ninth Circuit is all the more significant because the Ninth Circuit has also radically expanded FCRA's substantive requirements. Prior to the Ninth Circuit's opinion in this case, the question of what constitutes an "adverse action" in the insurance context had not been addressed by any federal appellate court since the relevant statutory provisions were enacted in 1970. Now the Ninth Circuit's holding that an adverse action occurs whenever a consumer is not afforded an even greater discount because his insurance score is less than the top potential score effectively requires insurance companies to send adverse-action notices to the vast majority of consumers because few consumers have the top potential score. If the vast majority of consumers that apply for insurance will now *always* receive adverse-action notices, then Congress's stated purpose for enacting the notice requirement—namely, to notify consumers

[33]*See, e.g., Yeagley v. Wells Fargo & Co.*, No. 05-CV-03403 (N.D. Cal. filed Aug. 22, 2005); *Hogan v. PMI Mortgage Ins. Co.*, No. 05-CV-03851 (N.D. Cal. filed Sept. 23, 2005); *Luther v. 1-800-Bar-None*, No. 05-CV-04026 (N.D. Cal. filed Oct. 5, 2005); *Murray v. Sunrise Chevrolet, Inc.*, No. 04-CV-7668 (N.D. Ill. filed Nov. 24, 2004); *Murray v. Cingular Wireless II, LLC*, No. 05-CV-01334 (N.D. Ill. filed Mar. 7, 2005); *Ashby v. Farmers Ins. Co. of Or.*, No. 01-CV-1446 (D. Or. filed Sept. 28, 2001); *Spano v. Safeco Ins. Co. of Or.*, No. 01-CV-01464 (D. Or. filed Oct. 2, 2001); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466 (D. Or. filed Oct. 3, 2001); *Rausch v. Hartford Fin. Servs. Group, Inc.*, No. 01-CV-1529 (D. Or. filed Oct. 16, 2001); *Dowdy v. St. Paul Travelers Ins. Co.*, No. 05-CV-02718 (D.S.C. filed Sept. 19, 2005).

[34]*See, e.g., In re Farmers Ins. Co.*, No. 03-CV-158 (W.D. Okla. filed Dec. 10, 2001); *In re Trans Union Privacy Litig.*, No. 00-CV-04729 (N.D. Ill. filed Aug. 3, 2000).

when their credit information has adversely affected them—will not be served. Instead, consumers are likely to become so desensitized or confused by the adverse-action notices they unnecessarily receive that they will simply disregard them.[35] The Ninth Circuit is simply mistaken. Unfortunately, its mistake is neither simple nor trivial. As pointed out by the various amici curiae who submitted briefs in the Ninth Circuit, this mistake stands to cost insurance companies and ultimately consumers *billions* of dollars.

I. The circuits are split over how to define "willfully" under FCRA, and now the Ninth Circuit has adopted a standard that this Court expressly rejected in determining willfulness under another federal statute where much less was at stake.

A. The circuit split is real and is creating confusion and varying standards among the lower courts for awarding punitive damages.

FCRA contains two separate sections that comprise two different standards or tiers of civil liability. While actual damages can be recovered under FCRA upon a showing of "negligent" noncompliance, statutory and punitive damages can only be recovered upon a higher showing of "willful" noncompliance.[36] FCRA does not define the term "willfully," and the circuits are split over how to define it.

Specifically, with respect to the mens rea necessary to establish willful noncompliance, the circuits are split over whether reckless disregard or actual knowledge is required. Although the Third Circuit has adopted a reckless-disregard standard, at least the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits require actual knowledge with regard to the law. And now the Ninth Circuit, while purporting to adopt the Third Circuit's reckless-disregard standard, has adopted a standard that conflicts with the precedent

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[35] *See The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, U.S. Federal Trade Commission) ("[I]f you give notices too widely and in too many circumstances, then it [*sic*] . . . becomes something that people ignore.").

[36] *Compare* 15 U.S.C. § 1681o, *with* 15 U.S.C. § 1681n.

of this Court and requires a lower form of mens rea than any other circuit, including the Third Circuit.

In *Phillips v. Grendahl*,[37] the Eighth Circuit held that to be willful under FCRA the defendant "*must . . . be conscious that his act impinges on the rights of others.*"[38] The court made clear that recklessness does not "suffice to establish willfulness under the statute."[39] And thus, "willful noncompliance under section 1681n requires knowing and intentional commission of an act *the defendant knows to violate the law.*"[40] The Eighth Circuit found support for its actual-knowledge standard in decisions of the Second, Fourth, Fifth, Sixth, and Tenth Circuits.[41]

Following the Eighth Circuit, the Seventh Circuit held in *Wantz v. Experian Information Solutions*[42] that, under FCRA, "[t]o act willfully, a defendant must knowingly and intentionally violate the Act, and *it 'must also be conscious that [its] act impinges* on the rights of others.'"[43] Since its decision in *Wantz*, the Seventh Circuit has twice reaffirmed its commitment to the Eighth Circuit's definition.[44]

Like the Seventh and Eighth Circuits, the Sixth Circuit has also adopted an actual-knowledge standard. In *Duncan v. Handmaker*,[45] the Sixth Circuit held that "defendants cannot be held civilly liable if they obtained the Duncans' reports 'under what is believed to be a proper purpose under the statute but which a court . . . later rules to be impermissible legally under § 1681b.'"[46]

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[37]312 F.3d 357 (8th Cir. 2002).

[38]*Id.* at 368 (emphasis added).

[39]*Id.* at 369.

[40]*Id.* at 370 (emphasis added).

[41]*Id.* at 368-69.

[42]386 F.3d 829 (7th Cir. 2004).

[43]*Id.* at 834 (quoting *Phillips*, 312 F.3d at 368) (emphasis added).

[44]*See Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005) (quoting *Wantz* and stating that to be willful a defendant must be "conscious that its act impinges on the rights of others"); and *Bagby v. Experian Info. Solutions, Inc.*, No. 04-2593, 2006 U.S. App. LEXIS 310, at **16 (7th Cir. Jan. 4, 2006) (same).

[45]149 F.3d 424 (6th Cir. 1998).

[46]*Id.* at 429; *see also Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1098 n.17 (9th Cir. 2006) ("The Sixth Circuit has implied that actual knowledge is necessary."). (App. at 32a n.17.)

Similarly, in *Stevenson v. TRW, Inc.*,[47] the Fifth Circuit stated that willfulness requires "an act in conscious disregard for the rights of others," which can only exist where the defendant engaged in "willful misrepresentations or concealments."[48] The court then held that the defendant did not act willfully because there was no evidence that the defendant had "any intention to thwart consciously" the plaintiff's rights.[49] The Fourth Circuit follows the Fifth Circuit's "conscious disregard" standard,[50] and has affirmed summary judgment for a defendant on the issue of willfulness because the plaintiff could not show that the defendant "was aware" of the alleged wrongdoing.[51]

Unlike the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, which all require actual knowledge with regard to the law, the Third Circuit defines willfulness in part using a "reckless disregard" standard. In *Cushman v. Trans Union Corp.*,[52] the Third Circuit held that "willfully" entails a "conscious disregard" of the law, which it defined as "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA *or in reckless disregard* of whether the policy [or action] contravened those rights."[53] In so doing, the Third Circuit expressly declined to follow the Fifth Circuit's holding in *Stevenson*, but made clear that its "reckless disregard" standard was not a major departure from the Fifth Circuit's standard because "a defendant's actions must be on the same order as willful concealments or misrepresentations."[54]

The Ninth Circuit has now, in this case, nominally adopted the Third Circuit's "knowing or reckless disregard" standard

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[47]987 F.2d 288 (5th Cir. 1993).

[48]*Id.* at 293-94.

[49]*Id.* at 294.

[50]*See Dalton v. Cap. Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001) (citing the Fifth Circuit's holdings in *Stevenson* and *Pinner v. Schmidt*, 805 F.2d 1258 (5th Cir. 1986)).

[51]*Dalton*, 257 F.3d at 418.

[52]115 F.3d 220 (3d Cir. 1997).

[53]*Id.* at 227 (emphasis added).

[54]*Id.*

for willfulness.[55] But the court has further defined its supposed "reckless disregard" standard by stating that a company may be found to have acted with reckless disregard if it acts diligently and in good faith but relies on an "unreasonable[]," "implausible," "creative," or "untenable" interpretation of FCRA.[56]

How willfulness is defined and construed under FCRA is an important and recurring issue. District courts in the Second, Tenth, and Eleventh Circuits have adopted varying definitions of willfulness, some requiring actual knowledge and others requiring mere "reckless disregard."[57] These decisions further demonstrate the confusion and varying standards for punitive damages that the circuit split has created. That circuit split by itself warrants certiorari because there is a clear need for definitive guidance from this Court.

B. The Ninth Circuit has adopted a willfulness standard that this Court rejected in another context because it would "permit a finding of willfulness to be based on nothing more than negligence, or perhaps, on a completely good-faith but incorrect"[58] belief.

In its opinion, the Ninth Circuit ostensibly recognizes that negligence does not suffice to prove willfulness.[59] But the Ninth Circuit then defines its purported "reckless disregard"

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[55] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1098 (9th Cir. 2006) (quoting *Cushman*, 115 F.3d at 227). (App. at 31a.)

[56] *Reynolds*, 435 F.3d at 1099 (emphasis added). (App. at 33a-34a.)

[57] *Compare Jordan v. Equifax Info. Servs.*, 410 F. Supp. 2d 1349, 1354 (N.D. Ga. 2006) (adopting the Eighth Circuit's standard), *Cole v. Am. Family Mut. Ins. Co.*, 410 F. Supp. 2d 1020, 1024 (D. Kan. 2006) (adopting an actual knowledge standard), and *Spector v. Equifax Info. Servs.*, 338 F. Supp. 2d 378, 387-88 (D. Conn. 2004) (applying actual knowledge standard); *with Apodaca v. Discover Fin. Servs.*, 417 F. Supp. 2d 1220, 1228-29 (D.N.M. 2006) (adopting the reckless disregard standard), and *Veno v. AT&T Corp.*, 297 F. Supp. 2d 379, 384 (D. Ma. 2003) (stating that reckless indifference is sufficient to prove willfulness).

[58] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988).

[59] *See Reynolds*, 435 F.3d at 1097-98 (stating as much and then citing, at page 1098 in its discussion of the mens rea required with regard to the law, footnote 13 from this Court's opinion in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988)). (App. at 30a, 32a.)

standard by stating that a company may be found to have acted recklessly unless it (1) has "diligently and in good faith" attempted to determine its obligations *and* (2) "*has thereby* come" to a "reasonable," "plausible" (which means reasonable), non-"creative," and "tenable" interpretation of FCRA:

> [This reckless-disregard standard] encourages companies that use consumer credit reports *to make the necessary effort* to inform themselves fully and fairly as to their statutory obligations . . . .
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> . . . A company will not have acted in reckless disregard of a consumer's rights if it has *diligently and in good faith* attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute *and has thereby come to a tenable, albeit erroneous, interpretation of the statute.* In contrast, neither a deliberate failure to determine the extent of its obligations *nor reliance on creative lawyering that provides indefensible answers* will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. *Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.*
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> Where, *as here*, at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive. . . . *Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation.* In some cases, it may also depend in part on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel.[60]

This willfulness standard is virtually identical to the standard that this Court rejected in another context, where much less

[60] *Reynolds*, 435 F.3d at 1099 (emphasis added). (App. at 33a-34a.)

was at stake, because such a standard "make[s] the issue in most cases turn on whether the [defendant] sought legal advice," and "permit[s] a finding of willfulness to be based on nothing more than negligence, or perhaps, on a completely good-faith but incorrect assumption."[61]

In *McLaughlin v. Richland Shoe Co.*,[62] this Court granted certiorari to determine "the meaning of the word 'willful' as used in the statute of limitations applicable to civil actions to enforce the Fair Labor Standards Act" ("FLSA").[63] Unlike here, where the consequence of a willfulness finding is punitive damages, under the FLSA, if a violation is willful, the statute of limitations is extended from two to three years.[64] In *Richland Shoe*, the Secretary of Labor urged this Court to adopt a standard that is virtually identical to the one adopted by the Ninth Circuit in this case:

> We think an employer's unlawful pay practices should be found willful for purposes of the FLSA limitations provision when the employer is aware of the potential application of the FLSA but pursues the pay practices *without reliable assurances of their legality*. . . . If . . . the employer fails to take steps reasonably calculated to determine whether its practices comply with the law, its violations should be considered willful. If the employer does take steps to determine its legal responsibilities, then *it may limit its liability by showing that it received reasonable advice* that its practices complied with the law and that it relied in good faith on such advice.
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> . . . .
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> [A]n employer's violation should be held willful if the employer, recognizing it may be covered by the FLSA, *acted without a reasonable basis for believing that it was complying with the statute. Such a basis may be absent because the employer failed*

[61] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988).
[62] 486 U.S. 128.
[63] *Id.* at 129.
[64] *Id.*

> *to seek a reliable determination of its obligations under the FLSA or because the advice it received afforded no sound basis for eliminating existing uncertainties about the employer's compliance.*[65]

This Court observed that the Secretary's standard "would apparently make the issue in most cases turn on whether the employer sought legal advice concerning its pay practices."[66] The Court then rejected that standard because "*[i]t would . . . permit a finding of willfulness to be based on nothing more than negligence, or perhaps, on a completely good-faith but incorrect assumption that a pay plan complied with the FLSA in all respects.*"[67] The Court adopted a "reckless disregard" standard for willfulness, but then took the opportunity to clarify some of the language that it had used in an earlier opinion to point out that "unreasonableness" does not suffice to prove reckless disregard:

> We recognize that there is some language in *Trans World Airlines v. Thurston*, 469 U.S. 111, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985) . . . , not necessary to our holding, *that would seem to permit a finding of unreasonableness to suffice as proof of knowing or reckless disregard*, and thus that would render [the Secretary's] standard an appropriate statement of the law. *See id.*, at 126. Our decision today should clarify this point: If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful under either [the Secretary's] test or under the standard we set forth. *If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under [the Secretary's] test, it should*

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[65]Brief for the Petitioner, *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 905, at *25, 62 (emphasis added); *see also* Petition for a Writ of Certiorari, *Richland Shoe*, 486 U.S. 128 (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 907, at *29 (urging the same standard).

[66]*Richland Shoe*, 486 U.S. at 134.

[67]*Id.* at 135 (emphasis added).

not be so considered under Thurston or the identical standard we approve today.[68]

The Secretary of Labor's proposed-but-rejected willfulness definition in *Richland Shoe* and the Ninth Circuit's willfulness definition in this case are similar if not identical. Indeed, under the Secretary's proposed standard in *Richland Shoe*, the inquiry focused on whether the employer sought legal advice, and, if so, whether the legal advice received was "reasonable," whether the advice provided "reliable assurances," and whether the advice provided a "reasonable" or "sound basis" for the employer to believe that it was complying with the FLSA.[69] Likewise, under the Ninth Circuit's willfulness standard, the inquiry focuses on whether a company sought legal advice, and, if so, whether the advice that it received was "reasonable," "plausible," non-"creative," and "tenable."[70]

If the Secretary's proposed willfulness definition in *Richland Shoe* was inappropriate because "[i]t would . . . permit a finding of willfulness to be based on nothing more than negligence, or . . . a completely good-faith but incorrect" belief,[71] the Ninth Circuit's standard is all the more inappropriate here because it too would permit a finding of willfulness to be based on nothing more than some form of negligence or a completely good-faith but incorrect belief, and here the stakes are much higher. In the context of the FLSA, the consequence of a willful violation is a one-year extension of the statute of limitations, whereas here, a class of plaintiffs—*with no actual harm or damages*—could be entitled to recover literally millions of dollars in statutory and punitive damages. Moreover, the need to clearly delineate negligence and

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[68] *Id.* at 135 n.13 (emphasis added); *accord Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616 (1993) ("If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.").

[69] *See* Brief for the Petitioner, *Richland Shoe*, 486 U.S. 128 (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 905, at *25, 62 (emphasis added); *see also* Petition for a Writ of Certiorari, *Richland Shoe*, 486 U.S. 128 (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 907, at *29.

[70] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006). (App. at 33a-34a.)

[71] *Richland Shoe Co.*, 486 U.S. at 135.

willfulness in the context of FCRA is even greater than in the context of the FLSA because Congress intentionally provided two separate tiers of civil liability under FCRA: one for negligence and another for willfulness.[72]

Worse still, the Ninth Circuit's standard has effectively shifted the burden of proof by presuming willfulness in the absence of a showing of non-willfulness. Until now, the plaintiff has borne the burden of proof.[73] But under the Ninth Circuit's standard, if a company violates FCRA, the company can only avoid a willfulness finding if it *waives the attorney-client privilege and proves* that its lawyer's interpretation of the Act was "plausible," "reasonable," non-"creative," and "tenable." At least one district court has already recognized this shift in the burden of proof: "The new opinion in *Reynolds* . . . leaves open the possibility, *albeit by a small margin, that an insurer might be able to establish it did not act willfully* in formulating an unlawful adverse action notice, if the formulation of the notice was based on advice of counsel."[74] The Ninth Circuit's standard places a burden on companies that was never intended under FCRA.

Finally, practically speaking, perhaps as significant as any problem created by the Ninth Circuit's standard is that it is completely unworkable. Companies now have no idea how to avoid being punished with punitive damages. The Ninth Circuit's standard states that a company can avoid a willfulness finding if it acts "diligently and in good faith . . . *and has thereby come* to a tenable, albeit erroneous, interpretation" of FCRA.[75] Under that standard, a company can only avoid a willfulness finding if its interpretation of FCRA is later determined by a court to be "tenable." But this is not a practical standard. What is an "unreasonable[]," "implausible," "creative," and/or "untenable" legal opinion? And who determines if an incorrect interpretation of FCRA was "unreasonable[]," "implausible," "creative," and/

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[72]*Compare* 15 U.S.C. § 1681o, *with* 15 U.S.C. § 1681n.

[73]*See Wantz v. Experian Info. Solutions*, 386 F.3d 829, 833 (7th Cir. 2004) ("It is the plaintiff's burden to establish that he is entitled to damages.").

[74]*Ashby v. Farmers Ins. Co. of Oregon*, No. CV 01-1446-BR, slip op. at 8 (D. Or. Feb. 28, 2006) (emphasis added).

[75]*Reynolds*, 435 F.3d at 1099 (emphasis added). (App. at 34a.)

or "untenable"? Is a district court to decide as a matter of law? Or, as in this case, could a district court agree with a company's interpretation, grant summary judgment in the company's favor, only later for the Ninth Circuit to decide that the company's lawyer—*and therefore the district court*—had an incorrect and unreasonable interpretation of FCRA and thereby expose the company to statutory and punitive damages? How is a company to determine if its lawyer's interpretation is incorrect, implausible, unreasonable, or untenable, if the very reason the company sought legal advice in the first place was to learn how to comply with the law? Will a company be required to hire another lawyer to evaluate the quality of its lawyer's legal advice? The reality is, of course, that most companies do not independently research the legal issues on which they seek expert legal advice. As this Court has noted in another context, to require a company to challenge its lawyer or to seek a second or third opinion "would nullify the very purpose of seeking the advice of a presumed expert in the first place."[76] Perhaps no one would dispute that deliberately seeking an erroneous opinion to support an unlawful action could constitute willfulness. But if a company attempts to comply with FCRA by diligently and in good faith seeking and relying on a legal opinion, that company should not be punished with punitive damages for a willful violation because the Ninth Circuit later determines that its lawyer's interpretation of FCRA was unreasonable, implausible, or creative. The Ninth Circuit's standard, in effect, converts a lawyer's mere mistake or negligence into a client's recklessness.

To fully appreciate this point, the Court need only look to its own precedent in *Trans World Airlines, Inc. v. Thurston*.[77] In *Thurston*, the Court held that a "knew or showed reckless disregard" standard was an acceptable way to define willfulness under the Age Discrimination in Employment Act ("ADEA").[78] Despite holding that one of the defendant's defenses was not only incorrect but was also "meritless,"[79] this

[76] *United States v. Boyle*, 469 U.S. 241, 251 (1985).

[77] 469 U.S. 111 (1985).

[78] *Id.* at 125-26.

[79] *Id.* at 124.

Court held that the defendant did not act in reckless disregard of its obligations because it acted in good faith and tried to determine its obligations.[80] Importantly, the Court did not hold that the defendant acted in reckless disregard of the law because it and/or its lawyer relied on a "meritless" interpretation of the ADEA. Instead, the Court's inquiry centered on the *defendant's* actions and mens rea (or lack thereof) – not the quality of the advice the defendant received from counsel.

Companies must be given clear standards so that they can comply with the law and know how to avoid being punished with punitive damages. As Judge Richard Posner noted in another context, without such guidelines punitive damages fail to serve any valid purpose:

> [P]unitive damages, like criminal fines which they resemble, are reserved for cases where the wrongfulness of the defendant's conduct is conspicuous, implying that its wrongfulness is apparent to the person who engages in it, and not just to a lawyer. If one needed great subtlety to realize that one had strayed into the forbidden zone where punitive damages are a sanction, the deterrent effect of such damages would be distorted. Some people would stray into the zone unknowingly; as to them the threat of punitive damages would not deter. Others would steer far clear of the zone, not knowing where it began; as to them lawful as well as unlawful conduct would be deterred.[81]

But under the Ninth Circuit's standard, even "great subtlety" cannot remove the threat of punitive damages. Indeed, a company could retain the best lawyer with the most specialized knowledge of FCRA, provide full disclosure to the lawyer, rely in good faith on the lawyer's interpretation of FCRA with no authority to the contrary, convince a federal judge (the epitome of a reasonable jurist) that the company's interpretation of FCRA was correct, and then still be held to

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[80] *Id.* at 129-30.

[81] *Soderbeck v. Burnett County*, 752 F.2d 285, 291 (7th Cir. 1985).

have acted willfully if the Ninth Circuit determines that the lawyer's interpretation falls below some undefined level of incorrectness. Companies acting diligently and in good faith can and will be punished under the Ninth Circuit's standard, all efforts to the contrary notwithstanding.

On two different occasions the Ninth Circuit withdrew and tried to correct its opinion in this case. Given the changes that the Ninth Circuit made to its first opinion in particular, it is obvious that the Ninth Circuit recognized that it had adopted a negligence standard for willfulness. Although the Ninth Circuit tried to remove the negligence standard from its opinion, its "unreasonableness" analysis still remains as a test for reckless disregard and thereby willfulness. But as this Court stated in *Richland Shoe*, "unreasonableness . . . [does not] suffice as proof of knowing or reckless disregard."[82]

C. The Fourth, Fifth, Sixth, Seventh, and Eighth Circuits are correct—willfulness under FCRA should require actual knowledge with regard to the law.

The Ninth Circuit adopted its reckless-disregard standard in part because the Ninth Circuit believed that it was consistent with this Court's holding in *Trans World Airlines v. Thurston*,[83] which interpreted the term "willfully" as used in the ADEA.[84] But the Ninth Circuit ignored the fact that a reckless-disregard standard was adopted in *Thurston* largely because the ADEA's legislative history suggested that Congress intended for liquidated damages to apply to reckless conduct.[85] The Ninth Circuit cited no legislative history, presumably because there is none, to support its holding that "willfully" in FCRA means "reckless disregard." Actually, quite to the contrary, FCRA's legislative history supports the interpretation of the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits that "willfully" means actual knowledge with respect to the law.

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[82] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988).

[83] 469 U.S. 111.

[84] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1098 (9th Cir. 2006). (App. at 31a-32a.)

[85] *Thurston*, 469 U.S. at 125-26; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (recognizing that *Thurston*'s reckless disregard standard was grounded in the legislative history of the ADEA).

The bill that ultimately became FCRA originally contained a gross-negligence standard for actual damages and a willfulness standard for actual and punitive damages.[86] After considering whether to lower the standard for the recovery of actual damages to simple negligence, and to allow actual damages and punitive damages for either willful *or grossly negligent* violations,[87] Congress ultimately adopted negligence as the standard for actual damages and willfulness as the standard for actual and punitive damages.[88] Congress thus chose to limit the availability of punitive damages to violations that were willful, rather than grossly negligent.[89]

At the time that Congress enacted FCRA, recklessness and gross negligence were the same for all practical purposes.[90] Thus, the Ninth Circuit's adoption of a "reckless disregard" standard effectively reads back into § 1681n the gross-negligence standard that Congress deliberately chose not to include over thirty-five years ago. If Congress had intended to include a "gross negligence" standard in § 1681n, it certainly knew how to do so.[91] It did not. Thus, the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits correctly require a knowing violation of the law for willfulness.

Finally, even assuming *arguendo* that a reckless-disregard standard is appropriate in the context of FCRA, which it is not, any such recklessness standard should at a minimum require recklessness in its subjective form. A subjective form of recklessness would be more consistent with this Court's

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[86]S. 823, 91st Cong. §§ 616-17 (1969).

[87]H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970).

[88]H.R. Rep. No. 91-1587, at 30 (1970) (Conf. Rep.).

[89]15 U.S.C. § 1681n (1970).

[90]*See, e.g.*, Black's Law Dictionary 1185 (4th ed. 1968) (defining "gross negligence" as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences"); *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 491 (1875) (defining gross negligence in part as "utter recklessness"); and *United States v. Schmidt*, 626 F.2d 616, 617 (8th Cir. 1980) (defining "gross negligence" under 18 U.S.C. § 1112 as conduct done "with a wanton or reckless disregard for human life").

[91]*See also* 10 U.S.C. § 909 (2000) ("Any person . . . who willfully or recklessly" wastes, spoils, or destroys military property is subject to punishment.)

repeated efforts to prevent the imposition of punitive damages where a company incorrectly interprets the law in good faith.

Not long ago, in *Kolstad v. American Dental Ass'n*,[92] this Court granted certiorari to decide the circumstances under which punitive damages can be awarded in an action brought under Title VII of the Civil Rights Act of 1964.[93] The Civil Rights Act of 1991 limits compensatory and punitive damages to cases of "intentional discrimination" but further qualifies the availability of punitive awards by making them available only where the defendant acted "with malice *or with reckless indifference* to the federally protected rights of an aggrieved individual."[94] Part of this Court's analysis in *Kolstad* focused on the proper way to define "reckless indifference."[95]

In *Kolstad*, the Court noted that the "reckless indifference" standard in Title VII is the same "reckless disregard" standard that the Court has adopted for awarding liquidated damages under the ADEA.[96] The Court made it clear, however, that punitive damages could only be awarded under this standard where there has been "recklessness in its subjective form,"[97] i.e., the "employer must at least discriminate in the face of a *perceived risk* that its actions will violate federal law."[98] This is partly because punitive damages are designed in part to punish "criminal indifference to civil obligations."[99] Consequently, as in *Richland Shoe*, the Court emphasized that an incorrect interpretation of the law, held in good faith, should not and could not give rise to punitive damages under this subjective standard:

> *There will be circumstances where intentional discrimination does not give rise to punitive damages*

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[92]527 U.S. 526 (1999).

[93]*Id.* at 529.

[94]42 U.S.C. § 1981a(b)(1) (2000) (emphasis added).

[95]*See Kolstad*, 527 U.S. at 533-39.

[96]*See id.* at 537 (relying on the *Hazen Paper* "knew or showed reckless disregard" standard); *see also id.* at 548 (Stevens, J., concurring) (stating that the 1991 Act's standard was the same standard as used in the ADEA; discussing *Thurston* and noting that its reckless disregard standard requires "subjective consciousness").

[97]*Id.* at 535-36.

[98]*Id.* at 536 (emphasis added).

[99]*Smith v. Wade*, 461 U.S. 30, 41 (1983).

> *liability under this standard. In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful.*[100]

The Ninth Circuit's reckless-disregard standard in this case sets a lower threshold for punitive damages than this Court set in *Kolstad* because it allows a court to decide as a matter of law that a company has acted recklessly if the company should have known (based, for example, on its lawyer's *purportedly* "implausible" interpretation of the law), rather than actually did know, that there was a substantial risk that its policies or actions were in violation of FCRA.[101] Assuming *arguendo* that a "reckless disregard" standard is the proper way to determine willfulness in the context of FCRA, this reckless-disregard standard must be defined, as it was in *Kolstad*, to require recklessness in its subjective form. Otherwise any company that acts diligently and relies in good faith on what is later determined to be an incorrect interpretation of the law will nonetheless risk liability for statutory and punitive damages.

D. Because the district court interpreted FCRA precisely as did GEICO, GEICO's actions were objectively reasonable as a matter of law, precluding any finding of willfulness.

It is well settled in various contexts that a claim or defense asserted in litigation is not objectively baseless if it is one that a reasonable attorney would make. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,[102] while discussing the "sham" exception to the doctrine of antitrust immunity, this Court stated that "[a] winning lawsuit is by

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[100] *Kolstad*, 527 U.S. at 536-37 (emphasis added); *see also Wade*, 461 U.S. at 41-51 (noting that malice is not required to justify a punitive award but requiring recklessness in its subjective form).

[101] *See City of Canton v. Harris*, 489 U.S. 378, 390 (1989) (adopting an objective recklessness standard for purposes of establishing threshold liability under 42 U.S.C. § 1983); and *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994) (comparing objective recklessness with subjective recklessness).

[102] 508 U.S. 49 (1993).

definition a reasonable effort."[103] Thus, where a legal argument is successful in the trial court, then by definition that argument is objectively reasonable and cannot be deemed to be unreasonable.

Here, the district court agreed with GEICO's interpretations of FCRA, determined that GEICO had complied with FCRA, and granted summary judgment in GEICO's favor. This conclusively establishes that GEICO's interpretations and conduct were objectively reasonable as a matter of law.[104] The Ninth Circuit should not have remanded to the district court for an inquiry into the quality of the advice that GEICO received from its counsel and/or GEICO's subjective intent.

Given the circuit split, the Ninth Circuit's adoption of a willfulness standard that this Court rejected in *Richland Shoe* and a recklessness standard that this Court rejected in *Kolstad*, and the Ninth Circuit's decision to remand for an inquiry into the quality of GEICO's and its lawyers' interpretations of FCRA, it is imperative that this Court grant certiorari and establish a uniform rule, removing the confusion and disarray presently existing among the circuits. This case provides an excellent vehicle for resolving this important issue.

II. The Ninth Circuit's opinion imposes a new regulatory burden on insurance companies, the likely effect of which will be to confuse countless consumers who will receive adverse-action notices even though their credit information had either no impact or a favorable impact on their insurance.

Certiorari is also necessary to correct the Ninth Circuit's misinterpretation and misapplication of an absolutely critical substantive requirement of FCRA. The Ninth Circuit held that an adverse action has occurred and notice is required under § 1681m of the Act, even when a consumer's credit information has had no adverse impact on the rates or terms provided. Since FCRA took effect in 1970, no federal appellate court had

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[103] *See id.* at 60 n.5.

[104] *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (stating that if an employer acts reasonably it cannot be deemed to have acted willfully).

ever interpreted FCRA's definition of an adverse action in the context of insurance, until now. The Ninth Circuit's decision is the first published decision on the issue by *any* federal appellate court, and it has far-reaching state and national implications—both to American insurance consumers and to the entire insurance community. Unfortunately, the Ninth Circuit's decision has significantly burdened the insurance industry by imposing a new requirement on insurance companies not intended by Congress: that a company send an adverse-action notice even where the consumer has not suffered any adverse action. The likely effect of the Ninth Circuit's new requirement will be to "confuse tens of thousands of consumers whose insurance premiums are lower due to their favorable credit histories."[105]

Section 1681m of FCRA provides in part: "If any person takes any *adverse action* with respect to any consumer *that is based in whole or in part on any information contained in a consumer report*, the person shall . . . provide oral, written, or electronic notice of the adverse action to the consumer . . . ."[106] In connection with insurance, FCRA defines an "adverse action" as follows:

> The term "adverse action" . . . means . . . a denial or cancellation of, an increase in any charge for, or a reduction or other *adverse or unfavorable change* in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance . . . .[107]

But the Ninth Circuit has become the first federal appellate court to hold that an "adverse action" occurs and notice is required *even if a consumer's credit information helped him obtain a better rate for insurance* than if that information had not been considered. Rather than asking whether consideration of a consumer's credit information resulted in less favorable terms or rates, the inquiry under the Ninth Circuit's standard is now whether the consumer (who is already receiving the same or

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[105]Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable*, Washington Legal Foundation Legal Backgrounder, Jan. 27, 2006, *available at http://www.wlf.org/upload/012706LBDetlefsen. pdf.*

[106]15 U.S.C. § 1681m(a)(1) (emphasis added).

[107]15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

more favorable terms or rates than if his insurance score had not been used in any way) would have received an even better rate if his insurance score had been even better:

> [FCRA] requires such [adverse action] notices whenever a consumer pays a higher rate because his credit rating *is less than the top potential score*. In other words, if the consumer would have received a lower rate for his insurance *had the information in his consumer report been more favorable*, an adverse action has been taken against him.[108]

There is no provision in FCRA to support this construction of "adverse action." The Ninth Circuit's faulty, conclusory analysis rests upon the unsupported assumption that Congress intended for an adverse action to be determined in the insurance context, not by looking at the actual impact of a consumer's credit information on that consumer's insurance terms or rate, but instead by comparing the rate or terms obtained by the consumer with the rate or terms available to the consumer with a more favorable credit report. As one commentator has since noted:

> According to [the Ninth Circuit's] reasoning, a hypothetical first-time applicant for an auto insurance policy who was offered a premium discount because of her above-average credit score would nonetheless have suffered an "adverse action" at the hands of the insurer if an even better credit score would have qualified her for the insurer's very best rate. Even granting that the meaning of FCRA's adverse-action notice requirement is less than crystal clear, the panel's interpretation – that an insurer should be required to notify the consumer that she had been *adversely* affected when in fact she was helped by the use of her insurance score – defies common sense. Indeed, one wonders how an insurer would go about drafting such a notice. The panel's reasoning evokes that of a student who regards an "A" grade

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[108] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1093 (9th Cir. 2006) (emphasis added). (App. at 20a-21a.)

as an adverse action because his professor could conceivably have given him an "A-plus."[109]

Nowhere does the language of FCRA indicate that Congress intended for a company to be deemed to have taken an "adverse action" against an insurance consumer and required to issue an adverse-action notice merely because that consumer did not receive the company's lowest possible premium or "best rate." Under FCRA, *the consumer's credit information must have been the cause,* in whole or in part, of a less favorable rate or adverse terms. *If a consumer receives the same rate and terms that he otherwise would have received if his credit information had not been considered, no adverse-action notice should be required because the consumer's credit information has had no impact on his rate or terms.*

The uncontroverted evidence in this case shows precisely the problem with the Ninth Circuit's construction of "adverse action." GEICO's consideration of Edo's credit information had no impact whatsoever on the rate or terms of his insurance. Edo received the same rate and terms within the GEICO family of companies that he would have received *if his consumer credit information had not been considered.*[110] This is undisputed. The Ninth Circuit acknowledged this.[111] Edo has never contended that "but for" the use of his insurance score, he would have been offered insurance with better rates or terms. Yet, under the Ninth Circuit's reasoning, Edo was subject to at least one "adverse action" by GEICO, not because an examination of Edo's actual credit history led GEICO to decrease his coverage or charge him a higher premium, *but because Edo's consumer credit information did not have a more positive impact on the rate or terms he received.* There is simply no support in the plain language or legislative history of FCRA for holding that GEICO took any adverse or negative action against Edo on the basis of any actual credit information about Edo that GEICO considered.

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[109]Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable,* Washington Legal Foundation Legal Backgrounder, Jan. 27, 2006, *available at http://www.wlf.org/upload/012706LBDetlefsen.pdf* (footnote omitted).

[110](ER at 55, ¶ 11.)

[111]*Reynolds,* 435 F.3d at 1093 n.12. (App. at 21a n.12.)

The Ninth Circuit's new definition of "adverse action" requires an insurance company to inform a consumer (whose credit information has not adversely impacted her) that, had the consumer had a *better* credit report, she might have been *impacted positively*. While Congress enacted FCRA in part so that consumers will know when their credit information has adversely affected them, the insurance industry is now at a loss regarding how to draft an adverse-action notice under the Ninth Circuit's new adverse-action definition. The following has been suggested:

> Dear Insurance Applicant: Due to your favorable credit history, we are able to offer you a premium that is considerably lower than the premium we would have charged had you not had such a favorable credit history. That said, your credit is not quite good enough to qualify for our very lowest rate. Therefore, our offer of a substantial premium discount based on your excellent credit history constitutes an adverse action against you by us.[112]

This, of course, makes no sense. Because of the Ninth Circuit's definition, when consumers receive adverse-action notices, they will think that the use of their actual credit information hurt them, when, in fact, use of their actual credit information may not have had any impact on the terms or cost of their insurance—as in the case of Edo. In fact, use of that information may have even helped them. Given the substantial burden on the insurance industry and the confusion that the Ninth Circuit's opinion has created, there is a compelling need for this Court to exercise its supervisory power.

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[112]Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable*, Washington Legal Foundation Legal Backgrounder, Jan. 27, 2006, *available at http://www.wlf.org/upload/012706LBDetlefsen. pdf.*

CONCLUSION

The Ninth Circuit's standard for willfulness, which admittedly conflicts with the standard adopted by other Circuits, sets an impermissibly low threshold for the award of punitive damages by punishing companies that act in good faith. Moreover, the Ninth Circuit's erroneous definition of what constitutes an "adverse action" under FCRA potentially affects every insurance company, every user of consumer credit information, and even every insurance consumer in America. For all of the reasons identified herein, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ROBERT D. ALLEN*
MELONEY CARGIL PERRY
JAY F. UTLEY
BRANDON P. LONG
BAKER & MCKENZIE LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 978-3000

Attorneys for Petitioners

* *Counsel of Record*

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 25, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 03-35695, 04-35279

JASON RAY REYNOLDS; MATTHEW RAUSCH,

Plaintiffs-Appellants,

v.

HARTFORD FINANCIAL SERVICES GROUP, INC.; HARTFORD FIRE INSURANCE COMPANY,

Defendants-Appellees.

AJENE EDO,

Plaintiff-Appellant,

v.

GEICO CASUALTY COMPANY,

Defendant,

and

GEICO GENERAL INSURANCE COMPANY; GEICO INDEMNITY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Subsidiaries of Geico corporation,

Defendants-Appellees.

Argued and Submitted March 8, 2005.
Filed January 25, 2006.

Appendix A

JUDGES: Before: Stephen Reinhardt, Marsha S. Berzon, and Jay S. Bybee, Circuit Judges. Opinion by Judge Reinhardt.

OPINION

REINHARDT, Circuit Judge:

Under the Fair Credit Reporting Act ("FCRA"), insurance companies are required to send adverse action notices to consumers whenever they increase the rates for insurance on the basis of information contained in consumer credit reports. 15 U.S.C. §§ 1681a(k)(1)(B)(i), 1681m(a).[1] The principal question before us is straightforward: Does FCRA's adverse action notice requirement apply to the rate first charged in an initial policy of insurance? We hold that the answer is yes: The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate.

We also resolve five ancillary questions. First, we hold that FCRA's adverse action notice requirement applies whenever a consumer would have received a lower rate for

1. Section 1681m(a) provides that any person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide "notice of the adverse action to the consumer." Section 1681a(k)(1)(B)(i) defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

insurance had his credit information been more favorable, regardless of whether his credit rating is above or below average. Specifically, the requirement covers those whose credit information is disregarded and replaced for purposes of a rate computation by an average or neutral credit figure, so long as the insurance rates would have been lower had the credit information been more favorable. Second, we hold that charging more for insurance on the basis of a transmission stating that no credit information or insufficient credit information is available constitutes an adverse action based on information in a consumer report and therefore requires the giving of notice under FCRA. Third, we hold that, to comply with FCRA's notice requirement, a company must, *inter alia*, communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. Fourth, we hold that when a consumer applies for insurance with a family of companies and is charged a higher rate for insurance because of his credit report, two or more companies within that family may be jointly and severally liable. The notice requirement applies to any company that makes a decision that a higher rate shall be imposed, issues a policy at a higher rate, or refuses to provide a policy at a lower rate, if the company's action is based in whole or in part on the consumer's credit information.[2] Finally, we adopt the Third Circuit's definition of "willfully," as that term is employed in FCRA, and hold that a company is liable for a willful violation of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226

2. We do not intend this list to be exhaustive.

(3d Cir. 1997) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996) (as amended)). Like the Third Circuit, we hold that conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Id.* at 227.

I. THE ACT AND THE APPEALS

The Fair Credit Reporting Act seeks to ensure the "[a]ccuracy and fairness of credit reporting" through a variety of means. 15 U.S.C. § 1681. Central to this goal, FCRA limits the persons who may obtain consumer credit reports and requires users of such reports to notify consumers when, in reliance on a consumer report, "adverse action" has been taken. 15 U.S.C. §§ 1681a, 1681b, 1681m. Specifically, § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer." Adverse action notices advise consumers that an adverse action has been taken against them, and the nature of that action, and alerts them that they may view a copy of the consumer report that triggered the adverse action free of charge and correct any errors affecting their economic well-being. Even if reports are free from error, adverse action notices give consumers important information about how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future.

Appendix A

To resolve the various issues that have arisen regarding FCRA's notice of adverse action requirement in a set of related cases, we have consolidated two appeals for purposes of this opinion: *Reynolds v. Hartford Financial Services Group, Inc.*, No. 03-35695 and *Edo v. GEICO Casualty Co.*, No. 04-35279. *Reynolds* presents the principal issue: May a rate first charged in an initial policy of insurance constitute an increased rate for purposes of the FCRA adverse action notice requirement? Hartford Fire asserts that a rate cannot qualify as increased unless a lower rate has previously been charged to the customer. *Reynolds* also presents the issues whether a communication stating that no credit information or insufficient credit information is available constitutes a "consumer report" under the statute and whether an adverse action notice that does not tell the consumer that an adverse action has been taken against him, describe that action and its effect upon the consumer, and identify the parties taking the action is sufficient under FCRA. *Edo* presents the issue whether an adverse action occurs whenever a consumer would have received a lower rate if his credit information had been more favorable; or whether an insurance company's practice of providing an adverse action notice only if the consumer's credit information is below average (or "neutral") and that factor results in the imposition of a higher rate than if his credit rating had been average, is consistent with FCRA. Both *Edo* and *Reynolds* also require us to decide which companies are liable under FCRA for the failure to give notice of an increased rate when several affiliated companies are involved in the process of rate-setting and policy issuance. Finally, defendants in both cases seek summary judgment on the alternative ground that their actions were not willful as a matter of law. To address this

last contention, we must define the meaning of the term "willfully" as it applies in FCRA.

A. Reynolds v. Hartford Financial Services Group, Inc.

Jason Reynolds is the sole remaining named-plaintiff in this class action against Hartford Fire Insurance Company ("Hartford Fire").[3] He seeks statutory and punitive damages, as well as reasonable attorneys fees for the company's violation of FCRA's adverse action notice requirement. Reynolds' claims relate to two insurance policies he obtained, one for automobile and the other for homeowners insurance. On the record before us, Hartford Fire set the rates to be charged for both policies. Hartford Property and Casualty Insurance Company of Hartford ("PCIC Hartford") issued Reynolds the homeowners insurance policy and Hartford Insurance Company of the Midwest ("Hartford Midwest") issued him the automobile insurance policy. We refer to Hartford Fire, Hartford PCIC, and Hartford Midwest as the "Hartford Companies."

Reynolds originally sued Hartford Fire and later sought to amend his complaint to add PCIC Hartford and Hartford Midwest.[4] Hartford Fire sought summary judgment, which the district court granted on two grounds. First, it held that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the

3. Rausch is no longer pursuing his appeal.

4. Reynolds also named Hartford Financial Services Group, Inc., which serves as a holding company, but is not pursuing his claims against that entity.

contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Second, and in the alternative, it held that an insurance company that issues a policy to a new policy-holder "cannot [be held to] 'increase' a charge for insurance unless the insurer makes an initial demand for payment of the insured and subsequently increases the amount of that demand based on information in the insured's credit report." The second and alternative holding relies on a previous decision by the same court, *Mark v. Valley Insurance Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003). On the basis of that earlier decision, the district court also denied Reynolds leave to amend, reasoning that he could not "state viable FCRA claims against the proposed defendants," PCIC Hartford and Hartford Midwest. In other words, leave was denied on the ground that the policies were initial issues and no previous charge had been made to the customer at a lower rate.

The Hartford Companies' Use of Credit Information

During the relevant time period, Hartford Fire and the American Association of Retired Persons ("AARP") had an agreement under which Hartford Fire or one of its subsidiaries would issue automobile and homeowners insurance to AARP members at a premium rate if those individuals enjoyed favorable credit ratings. While the procedures used for issuing the two kinds of insurance varied slightly, they were the same in most relevant respects. In both cases, employees of Hartford Fire would make all of the decisions concerning AARP members' insurance policies for all of its subsidiaries, including Hartford Midwest, which issued automobile insurance, and PCIC Hartford, which issued homeowners

insurance. In doing so, Hartford Fire's employees would obtain credit information from Trans Union, a consumer information bureau, through a contract to which Hartford Fire and Trans Union were signatories. This information would be conveyed to Hartford Fire through the risk assessment and data supply firm, ChoicePoint, in the form of an "insurance score." High insurance scores correlated with more favorable credit reports. With regard to automobile insurance, if an AARP member had a high enough insurance score, he would qualify for a ten percent discount. With regard to homeowners insurance, only if the member obtained a top insurance score could he be assigned to the top tier of insurance with the best rate.

If, when Hartford Fire sent a request for an insurance score, no credit information matched the name and address of the consumer or if the information that did match was insufficient to generate an insurance score, this information would be transmitted to the company, and the consumer would be labeled a "no hit" or a "no score" and would not be assigned an insurance score. Without an insurance score, the consumer could not qualify for the ten percent discount with Hartford Midwest, nor could he be placed in the top insurance tier with PCIC Hartford. As a result, a "no hit" or "no score" consumer would in numerous instances pay more for insurance than if he had received a high insurance score.[5]

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5. In connection with Reynolds' request for automobile insurance, he was labeled a "no hit" because his name and address did not match any person's in the national database. In connection with his homeowners insurance request, he was labeled a "no score" because, while his name and address did call up information in the database, the information was insufficient to generate an insurance score. As both a label of "no hit" and "no score" have the same practical effect, for convenience's sake we will hereafter refer in this opinion to a report in either category as a "no hit."

Appendix A

The Hartford Companies' Adverse Action Policy

Hartford Fire is the only one of the Hartford Companies to have developed or sent adverse action notices. The parties dispute whether Hartford Fire actually sent an adverse action notice to Reynolds, but that is a question of fact for the factfinder. Whether the notice Hartford Fire contends it sent was adequate under FCRA is a question of law that we discuss below.

Reynolds' Insurance Policies

Reynolds applied for both automobile and homeowners insurance by contacting the Hartford Companies. He had no existing policy with that group. An employee of Hartford Fire collected personal information and attempted to obtain Reynold's insurance score twice, once for each insurance application. The credit bureau reported both times that Reynolds was a "no hit." *See* n. 5, *supra.* Although Hartford Midwest issued him an automobile insurance policy and Hartford PCIC issued him a homeowners insurance policy, as a result of his "no hit" status Reynolds did not receive either of the AARP premium rates.

B. Edo v. GEICO Casualty Co.

The second of the consolidated cases relates to an automobile insurance policy obtained by Ajene Edo. Like Reynolds, Edo seeks statutory and punitive damages, as well as reasonable attorney fees, on behalf of a class of consumers for violation of FCRA's adverse action notice requirement. He, too, is the sole remaining named-plaintiff. Edo appeals

the district court's grant of summary judgment to defendants Government Employees Insurance Company ("Government Employees"), GEICO General Insurance Company ("GEICO General"), and GEICO Indemnity Corporation ("GEICO Indemnity").[6] These are affiliated companies, all of which are subsidiaries of the GEICO Corporation and are referred to collectively by the parties as the "GEICO Companies." We sometimes refer to that group of companies by that designation and sometimes simply as GEICO.

Unlike Hartford Fire, the GEICO Companies concede that adverse actions can occur with respect to the first rates charged in an initial policy of insurance. They do not assert that in order for an adverse action to occur there must be an increase to a rate that the consumer has previously been charged. Nevertheless, the district court granted summary judgment with respect to the various GEICO entities on a number of different grounds. First, the court held that Edo did not have standing to bring a FCRA claim against Government Employees because he "was not eligible for insurance coverage from [that company] regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel." Next, it granted summary judgment in favor of GEICO General because that company "did not contract with Plaintiff to issue or to underwrite an insurance policy." This ruling was in accord with the district court's previous

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6. Edo is not pursuing his appeal against GEICO Casualty Corporation ("GEICO Casualty"), a company that writes insurance policies for high risk consumers and charges the highest rates. GEICO Casualty did not issue a policy of insurance to Edo, and Edo did not seek to obtain a policy at the unfavorable rates the company charged.

holdings in other related cases that only the company that issues the insurance policy can be held to have taken an adverse action under FCRA. *See Ashby v. Farmers Group, Inc.*, 261 F. Supp. 2d 1213, 1222 (D. Or. 2003); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977, 989-90 (D. Or. 2003). Finally, it granted summary judgment to GEICO Indemnity because "the premium charged to [Edo] by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."

GEICO's Use of Credit Information

The GEICO Companies are organized by risk. GEICO General provides preferred policies with low rates for those who are lesser insurance risks. Government Employees also provides preferred policies, but only to government employees. GEICO Indemnity issues standard policies with mid-level rates for moderate risk consumers. Finally, GEICO Casualty issues non-standard policies with high rates for those who are greater risks. The GEICO Companies began using consumer credit reports in early 1999.

In order to purchase insurance, consumers call a toll-free number and talk to a GEICO sales counselor. The sales counselor is employed by Government Employees but works on behalf of all of the GEICO Companies. Indeed, all of the work of the GEICO Companies is performed by Government Employees workers, as the other companies do not have any employees. Upon learning that a customer wishes to purchase automobile insurance, the sales counselor elicits basic information and asks whether he may use the customer's

credit information when arranging for his policy. If the customer acquiesces, the sales counselor obtains the credit information in the form of an insurance score calculated by the data analysis firm Fair Isaacs from information supplied by Trans Union. Government Employees is the only GEICO company that has a contract with Trans Union and Fair Isaacs to provide this information. Using a Government Employees computer system, the sales counselor converts the insurance score to a credit weight and combines it with other weights assigned to other insurance factors, such as age and number of accidents to arrive at a final total insurance weight. Based on that final weight, the sales counselor assigns the customer to one of the GEICO Companies and determines the appropriate insurance tier. This determination serves to establish the rate the consumer will be charged. After the information the customer has provided has been verified, he is issued an insurance policy at that rate.

GEICO's Adverse Action Policy

The GEICO Companies' original FCRA policy, adopted in 1999, was to send adverse action notices to all consumers whose credit reports were used in making insurance decisions. Later that same year, GEICO changed its policy, at least in part to reduce costs. Instead of sending adverse action notices to everyone, GEICO developed a system for determining which actions it deemed adverse by comparing the rate charged to the rate that it would have charged had the credit information been "neutral."

GEICO's new system, however, did not comply with FCRA's requirements. The GEICO Companies' policy during

the period relevant to this case was to compare the consumer's actual company and tier placement (which, as described above, was based in part on his credit rating) with the company and tier to which he would have been assigned had a "neutral" credit weight been substituted for his actual credit weight when calculating the final total insurance weight. The GEICO Companies' "neutral" credit weight was defined, generally speaking, as the weight that reflected the average credit rating of all consumers. The GEICO Companies would calculate two final total insurance weights, using only one variable—the actual credit weight in one case, and the "neutral" credit weight in the other. Only if the final total insurance weight using the "neutral" credit weight would have resulted in the consumer's placement with a different company or in a different tier than that to which the consumer was actually assigned, and only if such different placement would have resulted in the consumer's being charged a lower rate, would GEICO Companies issue an adverse action notice. In other words, the GEICO Companies' policy was to refrain from sending a statutory notice if use of the consumer's actual credit information caused the applicant to be placed with an entity and in a tier that resulted in the charging of the same or a lower rate than the rate that he would have been charged had the calculation and the ensuing assignment been based on a "neutral" or average credit rating. Under this policy, even if the rate ultimately charged was higher than the rate to which the consumer would have been entitled had he had a more favorable credit rating, the statutory notice was not sent if use of the "neutral" and the actual credit data would have led to an assignment to the same entity and tier. Thus, it was *not* GEICO's policy to send adverse action notices to all consumers who would have been charged lower rates had they enjoyed a more favorable credit rating.

Appendix A

Edo's Insurance Application

Following Edo's call to GEICO's toll-free number, the sales counselor used the credit information he obtained to place its new customer with GEICO Indemnity. The GEICO Companies then applied its policy for determining whether an adverse action had occurred. GEICO calculated that, had the neutral credit weight been used instead of Edo's actual credit weight, the resulting final total weight would still have resulted in Edo's being placed with GEICO Indemnity. That Edo's placement, and the rate charged for his insurance, did not improve when the "neutral" weight was used is not surprising, as Edo's actual credit weight was better than average. Under its policy, however, the GEICO Companies did not issue him an adverse action notice.

It is uncontested that if the GEICO Companies had used the highest credit weight that a consumer could receive rather than the neutral credit rate to determine Edo's alternate placement, GEICO would have placed Edo with GEICO General, a preferred company, and offered him a lower insurance rate. In short, if Edo's credit information had been more favorable (even though it was already above average), he would have been charged less for his insurance. In 2002, the GEICO Companies changed its policy and began to issue adverse action notices whenever a report with more favorable credit information would have resulted in a lower insurance rate. Under the new policy, Edo would have received the statutory notice.

II. ANALYSIS

A. Initial Policies of Insurance

The principal question in this and a number of related cases[7] constitutes a matter of first impression: Does FCRA's adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an increase in a rate that the consumer has previously been charged? As with all statutory interpretation, we begin with the text of the statute. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000). An adverse action with respect to insurance is defined by 15 U.S.C. § 1681a(k)(1)(B)(i) as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford,

7. The related cases are resolved by memoranda of disposition filed concurrently herewith.

refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor—such as adverse credit information, age, or driving record[8]—regardless of whether the customer was previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

"Increase" means to make something greater. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed.1988) (defining "increase" as "growth, enlargement, etc[.]"). "Charge" means the price demanded for goods or services. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required

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8. An adverse action under FCRA can, of course, only occur if the increase in charge was due to "information contained in a consumer report." 15 U.S.C. § 1681m(a). The consumer reports at issue in these cases are credit reports. While increases in charges may occur because of many factors, plaintiffs contest only the increases due to unfavorable credit information.

or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers [the Truth in Lending Act's] disclosure requirements." *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

Second, the statutory definition of "adverse action," as it is made applicable to insurance, explicitly encompasses "*any* insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Congress' use of the latter phrase demonstrates its intent that "adverse actions" apply to all insurance transactions—from an initial policy of insurance to a renewal of a long-held policy. The text of the statute does not permit the imposition of any temporal limitation. Hartford has suggested no sensible alternative reading of "existing or applied for." Thus, reading the terms "increase" and "charge" in the context of the provision as a

whole, particularly the "existing or applied for" phrase, supports affording them their ordinary meaning.

Third, our interpretation of the terms at issue best comports with the stated purpose of FCRA: to ensure the "accuracy and fairness of credit reporting." 15 U.S.C. § 1681. FCRA's adverse action notice requirement is an important tool that Congress created, using broad, encompassing language. Through this requirement, Congress sought to promote the rights of consumers by giving them essential information about how their credit report is used, information that they could obtain in no other way. The information Congress mandated serves two important ends. First and foremost, once consumers possess this information they can check and correct any errors in their credit reports. This increases the chances that a consumer's financial stability will not be hampered by faulty credit information. It also improves the overall accuracy of credit reports, which facilitates the operation of our markets. Second, even when credit reports are accurate, informing consumers when their credit rating is hurting them in the marketplace gives them important information about the benefits of improving their credit rating in the future and may even assist them in learning how to do so.

Hartford Fire's contention that FCRA does not apply to the rate charged in initial insurance policies would seriously undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers

only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). While our interpretation is the plain one, this canon supports our result.

We hold that whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA. Therefore, the fact that Reynolds' policy was an initial one, and his rate was the initial rate charged, is of no consequence. Reynolds' rate was increased above that which it would have otherwise been because of his credit report. As the statute's text is clear, we need not resort to either the agency's interpretations[9] or the statute's legislative history. The district court erred in granting summary judgment to Hartford Fire on the ground that FCRA does not apply to the rate first charged in an initial policy.[10]

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9. We note that our holding is consistent with the Federal Trade Commission's interpretation of the statute. Because we find FCRA unambiguous, however, we reach our decision independently of, and do not defer to, the agency's interpretation. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

10. Although our discussion has principally related to initial insurance policies, our interpretation of "increase in any charge" is obviously not limited to a consumer's first policy. As we have explained, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price. This definition applies equally to initial issues, amendments, and renewals of insurance policies.

Appendix A

B. What Constitutes An Adverse Action

The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.

FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his

consumer report been more favorable, an adverse action has been taken against him.[11] Such is the case with Edo. Because Edo would have been placed with GEICO General instead of GEICO Indemnity and thus would have been charged a lower rate if his credit rating had been higher, an adverse action occurred and an adverse action notice was required under FCRA.[12] Under the GEICO formula, the fact that the credit rating Edo actually received was higher than the average rating did not mean that Edo would not be charged a higher rate than he would have been charged had he had an even better credit report, but it ensured that he would not receive an adverse action notice when he was charged that increased rate. The district court erred in granting GEICO Indemnity summary judgment on the ground that Edo's rate was not increased on the basis of his credit report.

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11. We note that the statute does not require an insurance company to issue an adverse action notice simply because a consumer does not get the best possible rate. If a better credit report would not have reduced the consumer's insurance rate, his credit report is not the cause of the higher price and therefore no adverse action based on a credit report has occurred.

12. Making a slightly different argument, at least rhetorically, the GEICO Companies also argue that the action they took against Edo was not adverse because he was placed in the same company that he would have been placed in had his credit information not been used. While this is a true statement, it is only so because if the consumer refuses to allow his credit information to be used, the sales counselor assigns the consumer the "neutral" credit weight. Therefore, the GEICO Companies' argument that the action was not adverse because it was the same as if no credit information had been used is functionally identical to its argument that the action was not adverse because it was not detrimental when compared to the result using a "neutral" credit rating. Thus, this argument fails as well.

Appendix A

C. "No Hit" Adverse Actions

Hartford Fire makes a separate argument as to why in Reynolds' case no adverse action was taken. Specifically, the company argues that no adverse action was taken against Reynolds "based in whole or in part on any information contained in a consumer report" within the meaning of 15 U.S.C. § 1681m(a). When Hartford Fire requested credit information about Reynolds, Trans Union did not possess the necessary information to generate an insurance score and transmitted this finding to the insurer. Reynolds was therefore considered a "no hit." *See* n. 5, *supra.* Because he was so designated, Reynolds was rendered ineligible for the premium rates available to AARP members with qualifying credit ratings, and, as a result, was charged a higher rate in his initial policies. Hartford Fire argues, however, that these were not adverse actions because, it contends, an "adverse action" occurs only if it is based on "information contained in a consumer report" and no such report was received with respect to Reynolds. We reject Hartford Fire's argument.

FCRA's definition of "consumer report" is broad. It unquestionably encompasses a credit reporting agency's communication to an insurance company that a consumer does not have enough information on file for an insurance score to be calculated. Specifically, 15 U.S.C. § 1681a(d)(1) explains that "the term 'consumer report' means any written, oral, or other communication of *any information* by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . ." (emphasis added). Reporting that an agency cannot obtain any information regarding a consumer or that a consumer

has insufficient credit information on file conveys a message regarding the consumer's creditworthiness, standing, and capacity that makes his obtaining of credit far more difficult. Such a report suggests that the consumer cannot show that he pays debts in a timely manner. That information may be false: The credit agency may have used the wrong name or searched the wrong records, missing data that would have shown that the applicant is indeed creditworthy. Providing notice therefore serves the statutory purpose of allowing the consumer to correct errors in credit reports. Accordingly, we hold that a communication that a consumer has no information available or an insufficient credit history to permit the calculation of a credit rating qualifies as "a consumer report" within the meaning of FCRA. Because it is uncontested that Reynolds would have been charged lower insurance rates had he received qualifying credit ratings and because the application of the "no hit" rule precluded him from receiving such ratings, we hold that an adverse action was taken against him on the basis of information contained in a credit report. Accordingly, the district court's order of summary judgment may not be affirmed on the ground that its actions with respect to Reynolds were not based on such information.

D. Adequacy Of The Notice

Hartford Fire also urges us to affirm the district court's grant of summary judgment on the alternative ground that, although (in its view) it was not required under FCRA to send adverse action notices, the notices that the Hartford Companies did send were sufficient to meet its FCRA responsibilities. We reject this argument because the notices

were inadequate as a matter of law. Under 15 U.S.C. § 1681m(a)(1), a company that takes adverse action on the basis of a consumer report must "provide oral, written, or electronic notice of the adverse action to the consumer" as well as meet a number of other specific requirements.[13] While the term "notice of an adverse action" is not defined in the statute, we hold that, at a minimum, such a notice must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.[14] *See Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir. 1983) (requiring disclosure of "reliance on data contained in[a consumer's] credit report" when providing notice of an adverse action).

The notices Reynolds received did not comply with any of the above requirements. They did not tell him that any adverse action had been taken against him. They simply stated that "the Hartford's eligibility and pricing decisions are based

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13. The notice must also contain information regarding the consumer reporting agency. It must provide the name, address, and telephone number of the agency that provided the report, a statement that the agency did not make the adverse decision and is not able to explain it to the consumer, a statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the agency, and a statement setting forth the consumer's right to dispute directly with the agency the accuracy or completeness of any information in the report. *See* 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. § 698, App. H.

14. We do not decide whether a fuller description of what specific information was adverse is required as this question is not before us.

in part on consumer report(s) from a consumer reporting agency" and allowed him to make a written request in order to find out more. Reynolds was entitled to be informed that his rate for insurance was increased because of information in his credit report. He was also entitled to be told that Hartford Fire made the pricing decision and that Hartford PCIC and Hartford Midwest issued him policies at those higher rates. FCRA recognizes the difference between telling a consumer that his credit information *could* affect his insurance rate and that it *did* adversely affect his rate, and requires notice of the latter. We therefore reject Hartford Fire's alternative argument for upholding the district court's order.

E. Who Is Liable

The defendants all contend that only one company can be liable when an insurance policy contains an increase in rates—the issuing company. The plain text of the statute, as well as its purposes, are to the contrary. Here, we hold that all of the defendants are potentially liable under the statute.

FCRA requires that "any person" who takes an adverse action is liable. 15 U.S.C. § 1681m(a). The definition of "any" includes the plural. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed.1988) ("one, a, an, or some; one or more without specification or identification"). With regard to insurance transactions, liability attaches whenever an adverse action is taken "in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). This broad "in connection with" language confirms that a variety of entities may be

liable. No provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance. Therefore, the defendants find themselves in the difficult position of persuading us that Congress intended something different from what it wrote. We analyze their three arguments separately.

First, GEICO argues that the words "applied for" in the definition of adverse action, § 1681a(k)(1)(B)(i), demonstrate that only the issuing company is liable under the statute. On that basis, GEICO asks us to hold that Edo "applied for" insurance only with GEICO Indemnity because that was the company that issued him a policy. The argument is frivolous, both factually and legally. As a matter of fact, Edo did not apply to one company but instead requested insurance from the GEICO family of companies. He did not specifically ask to be placed with GEICO Indemnity, and the GEICO Companies did not interpret his telephone call as requesting a policy with that company in particular, as evidenced by the evaluation by Government Employees of his eligibility for a policy from several of the GEICO affiliates. That he was placed with GEICO Indemnity and not another GEICO entity was the result of a decision made by Government Employees personnel, not the result of a limited application by Edo. Thus, GEICO's argument has no basis in fact. Furthermore, as a matter of law, we refuse to turn the words "applied for" into a legal term of art that refers only t the issuing company. The clearest indication that Congress did not intend the words "applied for" to be used in such an unusual manner is that this interpretation would eliminate all potential FCRA

liability for denials of insurance. No one disputes that FCRA defines the term adverse action to include denials. 15 U.S.C. § 1681a(k)(1)(B)(i). However, under GEICO's interpretation, because a consumer has not "applied for" insurance unless a policy has been issued and because a company that denies insurance has not, by definition, issued a policy, adverse action notices would never be required for denials of insurance. This is manifestly contrary to the statute, as it would eliminate from its coverage an important set of actions that Congress clearly intended to subject to FCRA's requirements.

Second, all the defendants argue that "*takes* any adverse action" limits FCRA's adverse action notice requirement to companies that actually issue an insurance policy. We find no such limitation in the statute by virtue of Congress's use of the word "takes" or otherwise. 15 U.S.C. § 1681m(a). To the contrary, adverse action is defined far more broadly than just "issuance." 15 U.S.C. § 1681a(k). The statutory definition specifically includes denials and cancellations as well as increases in rates, and other unfavorable changes, whenever and by whomever made. The word "takes" neither adds to nor detracts from that definition. It describes the act of engaging in the conduct that gives rise to the notice requirement. As discussed below, all of the companies at issue here took "adverse actions," as that term is defined in the statute.

Third and finally, all the defendants argue that we should hold liable only the issuing company because holding several companies liable for FCRA violations arising out of the issuance or denial of a single application will result in

multiple, confusing adverse action notices, which would thwart rather than further FCRA's purpose. Such is not the case. Joint and several liability simply imposes the obligation on all of the affiliated companies responsible for taking an adverse action to ensure that the affected consumer receives a statutory notice describing the adverse affect of his credit report within that family of companies. Multiple notices are not required; a single notice from the companies involved identifying those companies and their respective roles will suffice.

Holding all the companies that take adverse action against a consumer jointly responsible for issuing a notice furthers FCRA's objectives. For example, joint responsibility substantially increases the prospect that an adverse action notice will be sent and that a customer who seeks to obtain insurance from a group of affiliated companies will be informed as to the manner in which his credit information adversely affected him. By imposing joint and several liability, Congress also improved the quality of information consumers receive, because each of the companies that takes an adverse action against the consumer must say so in the notice. We doubt that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure. By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy.

On the basis of the record before us all three GEICO Companies and Hartford Fire may be held liable under FCRA,

as may the two other Hartford entities as to which leave to amend was denied.[15] Two of the GEICO Companies, working together, are responsible for increasing Edo's charge for insurance: Government Employees, which made the decision as to which of the GEICO family of companies would issue the insurance to Edo and, in so doing, determined that he would be charged at an increased rate, and GEICO Indemnity, which then issued the insurance policy at that increased rate. GEICO General is responsible because it denied Edo insurance for the reason that his credit rating was not sufficiently high. Hartford Fire, like Government Employees, made the critical rate-to-be-charged decision. It determined that, on the basis of Reynolds' credit report, he was not eligible for the lower rates afforded by its affiliates to the qualifying AARP members and that he would be charged for his insurance at a higher rate. Hartford Fire may therefore be held liable for increasing Reynolds' charges for insurance on the basis of his credit rating. Hartford PCIC and Hartford Midwest issued the policies to Reynolds at the increased rates determined by Hartford Fire, and may, accordingly, be held liable as well.

In sum, Government Employees, GEICO General, and GEICO Indemnity may be held jointly and severally liable

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15. While the parties do not agree on every issue of fact, we hold that on the record before us there is no issue of material fact as to whether (1) Government Employees and Hartford Fire made the decisions that increased Edo's and Reynolds' rates, respectively, (2) GEICO General denied Edo a policy, and (3) GEICO Indemnity issued Edo a policy at an increased rate. All of these actions were taken by the companies involved and all constituted "adverse actions" within the meaning of FCRA.

for failing to issue an adverse action notice to Edo. Likewise, Hartford Fire may be held liable for failing to issue a notice to Reynolds, and Reynolds may also properly state claims against Hartford PCIC and Hartford Midwest. Thus, Reynolds should be permitted to amend his claims on remand.

F. Meaning Of Willfully

Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in FCRA.[16] Interestingly, there is no legislative history to explain what Congress intended by the use of that term.

We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." *See Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997). An act that is merely negligent is not willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115

16. "Any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. 15 U.S.C. § 1681n (emphasis added).

(1988) ("The word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."). Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive." *See, e.g., Dalton*, 257 F.3d at 418 (holding that a plaintiff need not show malice or evil motive); *Cousin*, 246 F.3d at 372 (same); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998); *Cushman*, 115 F.3d at 226 (same). *But see Duncan*, 149 F.3d at 429 (requiring " 'a motivation to injure' "). In this respect, for purposes of willfulness we distinguish civil from criminal liability. *See Bryan v. United States*, 524 U.S. 184, 191, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998) ("Most obviously [willfulness] differentiates between deliberate and unwitting conduct, but *in the criminal law* it also typically refers to a culpable state of mind." (emphasis added)).

Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Cushman*, 115 F.3d at 227. We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has

consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) (quoting *Thurston* and holding that, for an alleged civil violation of the Age Discrimination in Employment Act (ADEA), "willful" requires only a "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA'"); *McLaughlin*, 486 U.S. at 134 n. 13 (using the *Thurston* definition of "willful" in interpreting the Fair Labor Standards Act); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43, 58 S. Ct. 533, 82 L. Ed. 773 (1938) (holding civil defendant's failure to unload a cattle car was "willful" because it showed a disregard for governing statute and an indifference to its requirements). The Court's rule with respect to civil cases differs from its rule in criminal proceedings. In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute. *See Bryan*, 524 U.S. at 196 (requiring "knowledge that the conduct is unlawful" in a criminal case); *Ratzlaf v. United States*, 510 U.S. 135, 149, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994) (requiring proof that the criminal defendant "knew the structuring [of financial transactions] in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S. 192, 201, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991) (requiring proof that a criminal "defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").[17]

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17. The Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law. *Phillips*, 312 F.3d at 370 ("Wilful noncompliance under section

(Cont'd)

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the

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(Cont'd)

1681n requires knowing and intentional commission of an act the defendant knows to violate the law."). The Sixth Circuit has implied that actual knowledge is necessary. *Duncan*, 149 F.3d at 429 (suggesting that an actual belief of legality suffices to defeat willfulness liability under FCRA). The Eighth and Sixth Circuits, however, ignore *Thurston* and the cases that follow its reasoning.

action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

Where, as here, at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive. *See Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 645 (9th Cir. 1993); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 409 (5th Cir. 1989) (stating that "seeking legal advice [does not] ipso facto establish[ ] the appropriate intent [willfulness]"). Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel. Because the parties did not have an adequate opportunity to explore the issue in the district court, we remand for further proceedings.

III. CONCLUSION

In conclusion, we hold that FCRA applies, *inter alia*, to the first rates charged in initial insurance policies. We also hold that FCRA requires insurance companies to send adverse action notices whenever they charge a higher rate for insurance, in initial policies or otherwise, because of the consumer's credit information, not simply when the consumer's credit rating is below-average. Furthermore, we hold that a communication that there is a lack of sufficient credit information regarding a consumer is a credit report within the meaning of FCRA. In addition, we hold that adverse action notices must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. With respect to which companies in a group may be liable under FCRA, we hold that a company that makes the rate-setting decision, a company that issues the insurance policy, and any company that denies insurance at a more favorable rate may be held jointly and severally liable, and that such companies may provide a single adverse action notice to consumers containing all of the requisite information. Finally, we adopt the Third Circuit's definition of "willfully": Reckless disregard is sufficient.

As a consequence of these rulings, we hold that the district court erred in granting summary judgment to Hartford Fire on the basis that increased charges for insurance in an initial policy do not constitute adverse actions, and in denying Reynold's request for leave to amend his complaint to add Hartford PCIC and Hartford Midwest for that same reason.

Likewise, we hold that the district court erred in granting summary judgment to GEICO Indemnity on the basis that the actions it took were not adverse and granting summary judgment to Hartford Fire, Government Employees, and GEICO General on the basis that only the issuer of insurance can be liable under FCRA. Next, we hold that summary judgment may not be granted on the alternative grounds that a transmission that a consumer has insufficient credit information to generate a score is not a credit report, or that Hartford Fire's adverse action notices were sufficient. In sum, we reverse the district court's grant of summary judgment with respect to all defendants in both *Edo* and *Reynolds*, reverse its denial of Reynolds' request to amend his complaint to add Hartford PCIC and Hartford Midwest, and remand to the district court for further proceedings consistent with this opinion.[18]

REVERSED and REMANDED.

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18. We note that on appeal, plaintiffs seek only a reversal of the grant of summary judgment to defendants, and do not request such a judgment on their own behalf. Although "a court has the power sua sponte to grant summary judgment to a non-movant when there has been a motion but no cross-motion," we decline to do so here. *Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 494 (9th Cir. 2000).

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DECIDED FEBRUARY 23, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 02-678-BR

AJENE EDO,

Plaintiff,

v.

GEICO CASUALTY COMPANY, GEICO GENERAL INSURANCE COMPANY, GEICO INDEMNITY COMPANY, AND GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Defendants.

February 23, 2004, Decided

OPINION AND ORDER

BROWN, Judge.

This matter comes before the Court on Defendants' Renewed Motion for Summary Judgment (# 105) and Renewed Motion to Strike Expert Declaration of Birny Birnbaum (# 121).

Appendix B

For the reasons that follow, the Court GRANTS Defendants' Renewed Motion for Summary Judgment and GRANTS Defendants' Renewed Motion to Strike Expert Declaration. Accordingly, the Court DISMISSES this action with prejudice.

BACKGROUND

This is another in a series of cases in which the plaintiffs have raised the issue of the duty of insurance companies to provide their insureds or applicants for insurance with notice of adverse actions pursuant to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681m(a). In the other cases, the Court has previously addressed many of the issues raised by Plaintiff in this case, including those relating to statutory construction of the relevant FCRA provisions. The Court, therefore, need not revisit those issues in this Opinion.[1]

The following facts relevant to the specific issues in this case are taken from the parties' Concise Statements of Fact and Responses thereto and are undisputed unless otherwise indicated.

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1. For instance, both parties set out in well-reasoned and thoughtful arguments their differing views regarding the appropriate statutory construction to be given to the FCRA provisions that are relevant to the issues before the Court, including lengthy recitations of the legislative history and interpretations of the statute by the Federal Trade Commission (FTC). This Court, however, previously addressed those arguments in related FCRA cases and concluded the legislative history and FTC interpretations do not contradict the Court's conclusions regarding the plain meaning of the relevant statutory provisions. *See, e.g., Razilov v. Nationwide Mutual Ins. Co.*, 242 F. Supp. 2d 977, 990-91 (D. Or. 2003); *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1314-18 (D. Or. 2003).

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Plaintiff sought automobile insurance from "GEICO." GEICO has four affiliated insurance companies, each of which is named as a defendant in this case. Plaintiff began the process of obtaining insurance by talking on the telephone to a GEICO sales counselor. During that process, the sales counselor advised Plaintiff that GEICO considers an applicant's credit history when it calculates and quotes a premium rate for the insurance requested. Plaintiff agreed to the use of credit information to determine the premium rate, if any, that would be quoted to him. Based on Plaintiff's credit history and other factors, GEICO calculated an insurance score for Plaintiff and GEICO combined it with a Computer Assisted Underwriting System (CAU). CAU "recommended" GEICO offer to Plaintiff a premium rate for an insurance policy to be issued by GEICO Indemnity Company. GEICO Indemnity subsequently offered a premium rate to Plaintiff, which Plaintiff accepted. GEICO Indemnity then issued an automobile insurance policy to Plaintiff. The premium rate that GEICO Indemnity offered to Plaintiff would have been the same regardless of the information contained in Plaintiff's consumer credit history.

Defendant Government Employees offers insurance only to federal, state, county, or municipal government employees or military personnel. Plaintiff was none of the above.

Generally, Defendant GEICO Casualty Company issues nonstandard insurance policies with premiums, terms, and conditions of insurance coverage that are less favorable to an insured than those offered by GEICO Indemnity.

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Generally, Defendant GEICO General Insurance Company underwrites and issues "preferred" insurance policies with premium rates, terms, and conditions that are more favorable to insureds than those offered by a "standard" insurer such as GEICO Indemnity. Plaintiff's consumer credit history had no impact on GEICO's decision to place Plaintiff's insurance policy with GEICO Indemnity rather than GEICO General.

DEFENDANTS' RENEWED MOTION TO STRIKE EXPERT DECLARATION OF BIRNY BIRNBAUM

In support of their Opposition to Defendants' Motion for Summary Judgment, Plaintiff filed a Declaration of proposed expert witness Birny Birnbaum.

In related FCRA cases, the Court previously ruled it would not consider Birnbaum's legal arguments or interpretations of the plain meaning of FCRA because his proposed Declaration does not contain material that is the proper subject of expert testimony. *See, e.g., Rausch v. The Hartford Fin. Svcs. Grp., Inc.*, 2003 U.S. Dist. LEXIS 25892, CV-01-1529-BR, 2003 WL 22722061, at *2 (D. Or. July 31, 2003). The Court adheres to that ruling and declines to consider Birnbaum's testimony. In any event, to the extent Birnbaum's Declaration contains factual information, it is not relevant to the issues before the Court. Accordingly, the Court did not consider any such information.

Appendix B

DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

1. Standards.

Fed.R.Civ.P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarmo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Id.* A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer*,

Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

II. Fair Credit Reporting Act (FCRA).

Congress enacted FCRA for the stated purpose of requiring credit reporting agencies to adopt "reasonable procedures for meeting the needs of commerce for consumer credit, personal insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b). Although FCRA generally regulates credit reporting agencies, it also creates obligations for certain users of consumer credit information. In particular, 15 U.S.C. § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer."

FCRA defines "adverse action" in relevant part as follows:

> The term "adverse action"—
>
> (A) has the same meaning as in section 1691(d)(6) of this title; and
>
> (B) means—
>
> (i) *a denial* or cancellation *of*, an increase in any charge of, or a reduction or other adverse or unfavorable change in the terms

> of coverage or amount of, *any insurance, existing or applied for, in connection with the underwriting of insurance.*

15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

III. Standing.

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Medina v. Clinton*, 86 F.3d 155, 157 (9th Cir. 1996) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)). The three elements of standing are:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560 (ellipses and brackets in original; internal quotations and citations omitted). The plaintiff bears the burden of establishing these elements. *Id.*

In response to a summary judgment motion, the plaintiff cannot rest on mere allegations but must set forth by affidavit

or other evidence specific facts that will be taken to be true for purposes of the summary judgment motion. *Id.*

IV. Analysis.

The Court separately addresses Plaintiff's claims against the four Defendants:

a. Government Employees.

Plaintiff asserts Government Employees denied Plaintiff automobile insurance when it did not quote him a premium rate. Plaintiff further asserts Government Employees' denial was an adverse action that required it to provide Plaintiff with notice, which Government Employees did not do.

To trigger the notice requirements under FCRA, any adverse action must be based "in whole or in part on any information contained in a consumer [credit] report." 15 U.S.C. § 1681m(a). The evidence, however, establishes Plaintiff was not eligible for insurance coverage from Government Employees regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel. Plaintiff admits he was not a government employee or serving in the military when he applied for insurance with GEICO. Accordingly, the Court concludes Plaintiff has failed to establish he has standing to bring this claim against Government Employees.

In light of the above, the Court holds Government Employees is entitled to summary judgment as to Plaintiff's claims against it.

b. GEICO General.

Plaintiff brings a FCRA claim against GEICO General on the ground that GEICO General, like Government Employees, denied Plaintiff insurance coverage and failed to provide Plaintiff with notice of that adverse action. The record, however, reflects GEICO General did not contract with Plaintiff to issue or to underwrite an insurance policy.

This Court previously has held "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." *Rausch*, 2003 U.S. Dist. LEXIS 25892, [WL] at *1. In *Ashby v. Farmers Group, Inc.*, this Court addressed the relationship between the company that actually issued and underwrote the insurance (FICO) and the entity that established the process by which the premium rate quoted to an insured was determined (FGI):

> [A]s a matter of undisputed fact . . . FICO was the only entity that contracted with Plaintiffs, issued their policies, acquired the corresponding right to receive their premiums, and maintained the obligation to pay their claims of loss. As the entity that insured Plaintiffs, FICO also was the only entity capable of changing the terms of its insurance contract with Plaintiffs. For example, before FICO could increase the charge for such insurance, FICO had to offer its policyholders the proposed new rate. FGI's use of a rating system to determine the rate to charge was merely a process that preceded FICO taking adverse action by increasing a premium. Accordingly, the

> Court concludes FGI did not "take" any adverse action as an "insurer" when it made internal decisions and set rates that led to FICO taking its adverse actions against Plaintiffs.

261 F. Supp. 2d 1213, 1221 (D. Or. 2003). *See also Rausch*, 2003 U.S. Dist. LEXIS 25892, [WL] at *4-5; *Spano v. SAFECO Ins. Co. of Am.*, 215 F.R.D. 601, 606 (D. Or. 2003); *Razilov*, 242 F. Supp. 2d at 991. Similarly, GEICO General was not required to send Plaintiff a notice of adverse action.

Accordingly, the Court concludes GEICO General is entitled to summary judgment as to Plaintiff's claims against it.

c. GEICO Indemnity.

As noted, Plaintiff admits the premium charged to him by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history. Plaintiff, therefore, has failed to establish a genuine issue of material fact exists as to whether GEICO Indemnity took an adverse action against Plaintiff based "in whole or in part" on information in Plaintiff's consumer credit report.

Accordingly, the Court concludes GEICO Indemnity is entitled to summary judgment as to Plaintiff's claims against it.

d. GEICO Casualty.

Plaintiff admits the premium charged and the terms and conditions offered by GEICO Casualty are generally less favorable than the premiums charged and the terms and conditions offered by GEICO Indemnity. Plaintiff has not

presented any evidence that GEICO Casualty would have offered him a more favorable premium rate or more favorable terms and conditions than those offered to him by GEICO Indemnity even if GEICO Casualty had not based its premium rate calculation in whole or in part on information in Plaintiff's consumer credit report. The Court, therefore, concludes Plaintiff has failed to establish that GEICO Casualty's failure to offer him automobile insurance was an adverse action. In any event, GEICO Casualty could not have taken an adverse action against Plaintiff because GEICO Casualty did not contract to issue Plaintiff an insurance policy.

Accordingly, the Court concludes GEICO Casualty is entitled to summary judgment as to Plaintiff's claims against it.

CONCLUSION

For these reasons, the Court **GRANTS** Defendants' Renewed Motion for Summary Judgment (# 105) and **GRANTS** Defendants' Renewed Motion to Strike Expert Declaration of Birny Birnbaum (# 121). Accordingly, the Court **DISMISSES** this action **with prejudice**.

IT IS SO ORDERED.

DATED this 23rd day of February, 2004.

ANNA J. BROWN
United States District Judge

Appendix B

JUDGMENT

BROWN, Judge.

Based on the Court's Opinion and Order issued February 23, 2004, the Court **DISMISSES** this action **with prejudice**.

IT IS SO ORDERED.

DATED this 23rd day of February, 2004.

ANNA J. BROWN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC FILED APRIL 20, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-35695, 04-35279

JASON RAY REYNOLDS; MATTHEW RAUSCH,

Plaintiffs-Appellants,

v.

HARTFORD FINANCIAL SERVICES GROUP, INC.; HARTFORD FIRE INSURANCE COMPANY,

Defendants-Appellees.

AJENE EDO,

Plaintiff-Appellant,

v.

GEICO CASUALTY COMPANY,

Defendant,

and

GEICO GENERAL INSURANCE COMPANY; GEICO INDEMNITY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Subsidiaries of Geico corporation,

Defendants-Appellees.

Appendix C

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

The panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied. The mandate shall issue forthwith.

APPENDIX D — STATUTES INVOLVED

15 U.S.C. § 1681a (2000)

§ 1681a. Definitions; rules of-construction

* * *

(k) Adverse action.

(1) Actions included. The term "adverse action"—

* * *

(B) means—

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

* * * *

Appendix D

15 U.S.C. § 1681m (2000)

§ 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on basis of information contained in consumer reports. If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall—

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically—

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right—

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the

consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

* * * *

15 U.S.C. § 1681n (2000)

§ 1681n. Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance. Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees. Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C. § 1681o (2000)

§ 1681o. Civil liability for negligent noncompliance

(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together

with reasonable attorney's fees as determined by the court. (b) Attorney's fees. On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(4) (4) (4) (4)

Nos. 06-82, 06-84, 06-100, 06-101

Supreme Court, U.S.
FILED
AUG 21 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE CO.,
Petitioner,

v.

JASON RAY REYNOLDS,
Respondent.

SAFECO INSURANCE CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.,
Petitioners,

v.

JULIE WILLES,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

SCOTT A. SHORR
Counsel of Record
N. ROBERT STOLL
STEVE D. LARSON
STOLL STOLL BERNE LOKTING
& SHLACHTER, P.C.
209 Southwest Oak Street
Suite 500
Portland, Oregon 97204
(503) 227-1600

Attorneys for Respondents

August 2006

QUESTIONS PRESENTED

1. Whether petitioners have presented compelling reasons for this Court to review the meaning of the term "willful" in one subsection of the Fair Credit Reporting Act ("FCRA") in cases that are premature for review because (a) these cases are still at an interlocutory stage and were remanded for further proceedings following a reversal of summary judgment, (b) no court has ever examined the evidence of willfulness or applied any "willful" standard to the facts, and (c) there is no factual record of the "advice of counsel" defense that petitioners now raise on remand to refute a finding of willfulness?

2. Assuming that this Court should review at this interlocutory stage in the absence of a complete factual record, whether petitioners have presented compelling reasons for review in the absence of a true circuit split over the meaning of a "willful" violation for the particular subsection 15 U.S.C. § 1681n (a)(1)(A) of the FCRA that is at issue?

3. Whether GEICO, State Farm and Hartford Fire present compelling reasons to review the Ninth Circuit's interpretation of the definition of an "adverse action" and the notice requirements under the FCRA when petitioners fail to identify any conflicts among the circuits over those issues or demonstrate that the Ninth Circuit's analysis of the statutory definition is either incorrect or raises issues of national importance?

PARTIES TO THE COMBINED OPPOSITION

For the Court's convenience, respondents Jason Reynolds, Charles Burr, Shannon Massey, Ajene Edo and Julie Willes file this joint opposition to the petitions for writs of *certiorari* filed respectively by Hartford Fire Insurance Company ("Hartford Fire") (No. 06-82); Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon (collectively, "Safeco") (No. 06-84); GEICO General Insurance Company, GEICO Indemnity, and Government Employees Insurance Company (collectively, "GEICO") (No. 06-100); and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively, "State Farm") (No. 06-101). Respondent Reynolds is the respondent in No. 06-82; respondents Burr and Massey are respondents in No. 06-84; respondent Edo is the respondent in No. 06-100; and respondent Willes is the respondent in No. 06-101. Because petitioners filed separate petitions that raise overlapping issues largely arising out of a single Ninth Circuit opinion, respondents file a single combined opposition.

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INTRODUCTION

The respondents in these cases are individual consumers of automobile and property/casualty insurance who suffered "adverse actions" under the FCRA when the petitioners, various insurance companies, charged them more for insurance or denied them insurance based in part on their credit information. The Ninth Circuit held that petitioners' actions were "adverse actions" within the meaning of FCRA and remanded for further consideration the arguments of certain petitioners that their actions could not be found "willful." The principal argument in these four petitions is that the Ninth Circuit erred in interpreting "willful" to include either knowing or reckless disregard for consumers' rights under the FCRA. Petitioners claim the Ninth Circuit's holding conflicts with the definition of willfulness determined by other circuits. This issue does not merit review for several reasons.

First, review of the willfulness issue by this Court would be premature. These cases arise on summary judgment and the Safeco petition involves a Fed. R. Civ. P. 54(b) interlocutory appeal. Neither the trial court nor the Ninth Circuit has yet examined the evidence to determine whether petitioners acted willfully, either knowingly or recklessly. The Ninth Circuit remanded the case so the district court could examine the evidence. Further, contrary to petitioners' contentions that they have been prevented from or prejudiced in raising the advice of counsel defense, the Ninth Circuit was not presented with an advice of counsel defense, nor did it resolve whether petitioners are entitled to such a defense. The Ninth Circuit's statements concerning the defense are *dicta*. Following remand, petitioners GEICO and Safeco have raised this defense in the trial courts. It would be premature to grant *certiorari* when there is no factual record on advice of counsel and the larger factual issue of willfulness is unresolved.

This is particularly so in a case involving an abstract concept: the meaning of "willfulness." Willfulness is a fact-bound determination not readily explained by labels such as

"reckless disregard" or "conscious disregard." This Court will provide little useful guidance to the lower courts, attorneys, or those regulated by the FCRA if it attempts to apply such labels without a concrete evidentiary record and lower court factual findings. The meaning of a knowing or reckless violation only becomes clear against a well developed record that has been reviewed by a fact-finder and includes any evidence of advice of counsel on which the petitioners may wish to rely. The Ninth Circuit simply remanded the case to the district court to review the facts and provide that record.

Second, there is no square circuit conflict. The FCRA has several different liability sections and subsections. The statutory subsection at issue here, 15 U.S.C. § 1681n (a)(1)(A), merely requires proof of a "willful" violation. The immediately following FCRA subsections expressly require proof of both a willful *and* knowing violation or solely refer to a knowing violation without reference to willfulness. 15 U.S.C. §§ 1681n(a)(1)(B), 1681n(b), and 1681q. Thus, the FCRA's text makes clear that a willful violation is something less than a willful and knowing violation. The claimed circuit split is not a conflict over the interpretation of the text of the particular statutory subsection at issue here. Rather, the cases on which petitioners rely either interpret different statutory subsections, focus on the proof required to establish punitive damages, which are not at issue here, or fail to interpret the particular language of section 1681n(a)(1)(A).

Third, although petitioners assert that the Ninth Circuit's decision will expose them to a flood of litigation over the type of conduct at issue here, there is a serious question whether there is any remaining civil remedy for such violations. In the last two years, eleven different courts, including the Seventh Circuit, have concluded that the 2003 Fair and Accurate Credit Transaction Act (FACTA), which amended the FCRA, eliminated subsection 1681n claims filed after the passage of that Act for violations of section 1681m (the statute at issue here) postdating FACTA. Contrary to petitioners'

unsupported speculation that there has been an explosion in private litigation under the FCRA as a result of the Ninth Circuit's ruling, nearly every court to review the issue has concluded that FACTA prospectively eliminated the civil claims asserted here. The Ninth Circuit's ruling may thus have significance only for the finite class of pre-FACTA claims, obviating the importance of review by this Court.

Finally, petitioners State Farm, GEICO and Hartford Fire raise issues regarding the Ninth Circuit's interpretation of the definition of "adverse action" under the FCRA and its construction of FCRA's notice requirements. These petitioners do not even contend that the Ninth Circuit's routine statutory interpretations conflict with any other circuit precedent or precedent of this Court. The Ninth Circuit's interpretation of the statute is straightforward and correct.

STATEMENT OF THE CASE

I. RESPONDENTS' CLAIMS OF ADVERSE ACTION UNDER THE FCRA

This case involves interpretation of two subsections of the FCRA: 15 U.S.C. §1681n(a)(1)(A), one of the FCRA's several remedy sections, and 15 U.S.C.§ 1681a(k)(1)(B)(i), the definition of an "adverse action" under the FCRA. Respondents assert claims under subsection 1681n(a)(1)(A) for petitioners' failure to give adequate notice that they took "adverse actions" against the consumers, a violation of section 15 U.S.C. § 1681m (a). The insurance companies both denied insurance and increased premiums, "adverse actions" under the FCRA, based on review of the consumers' credit information (typically "credit scores" or "insurance scores" based on confidential financial, banking and credit information.)

The FCRA, at its core, is a notice statute. *Reynolds v. Hartford Fin. Servs. Group*, 435 F.3d, 1081, 1085 (9th Cir.

2006).[1] The FCRA gives insurance companies and other users the privilege to review confidential financial information of individual consumers. *See* 15 U.S.C. § 1681b(a)(3) (authorizing credit bureaus to provide confidential consumer credit information to insurers and others). Insurance companies use that information to price insurance premiums and decide whether to offer coverage. If an insurance company takes an adverse action, such as denying insurance or increasing a premium based on a review of a consumers' credit information (*see* 15 U.S.C. § 1681a(k)(1)(B)(i)), it must give notice that it took such action. 15 U.S.C. § 1681m.

This notice serves an important purpose by allowing consumers to check their credit files to confirm that the credit information consulted was accurate. *See Reynolds*, 435 F.3d at 1085; *see also* 15 U.S.C. § 1681 (the FCRA is designed to ensure "[a]ccuracy and fairness of credit reporting."). For instance, if an insurance company offers John *Allen* Smith a higher premium because his credit score is low, he can check whether the credit information consulted was accurate. If he discovers that the insurance company mistakenly reviewed the file of John *Alan* Smith or another consumer with a slightly different social security number, he can inform the credit bureau and, ultimately, the insurer that the insurer mistakenly increased his charge based on someone else's less favorable credit information. Or the consumer may discover that the insurer based his premium on an accurate identity, but used inaccurate financial information that lowered his credit rating and resulted in an increased charge.

In the trial court, petitioners sought summary judgment on the ground that they had not taken "adverse action"

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[1] Because *Reynolds*, the published Ninth Circuit opinion at issue, is reproduced with different pagination in each petitioner's appendix, we cite the reported opinion for simplicity *Reynolds* directly addressed the *Hartford Fire* and *GEICO* cases. The *State Farm* and *Safeco* cases were separately decided by short, unpublished memoranda citing *Reynolds*.

against respondents. Petitioners argued that when a first-time applicant for insurance is charged a higher premium because of his credit score, his premium has not been "increased"; thus, they never have to give notice of an adverse action in such circumstances and can, with impunity, use inaccurate credit information to make first-time applicants pay more for insurance. Petitioners argued that they only "increase" a premium based on credit information if they first charge a consumer a premium and later, after reviewing credit information, increase the charge (perhaps on a renewal application).

The district court initially accepted petitioners' argument, but the Ninth Circuit, relying on the statute's plain meaning, rejected it, holding that "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA." *Reynolds,* 435 F.3d at 1092. The Ninth Circuit pointed out that petitioners' position would eviscerate the statute's purpose of providing even *initial* applicants for insurance the proper notice when they are charged more based on their credit information. *Id.* at 1092-92; 15 U.S.C. § 1681a(k)(1)(B)(i) (providing that an adverse action includes "any increase in any charge for * * * any insurance, existing or *applied for*") (emphasis added). The Ninth Circuit's straightforward statutory construction ensures, as the statute provides, that consumers (including first-time applicants) who are charged more for insurance based on their credit file receive proper notice.

II. THE NINTH CIRCUIT'S STATEMENTS WITH RESPECT TO WILLFULNESS

Except for State Farm, petitioners also argued in the alternative that, as a matter of law, they did not "willfully" violate the statute under 15 U.S.C. § 1681n(a)(1)(A). Because the district court mistakenly agreed with petitioners' primary argument, it never reached the issue of defendants willfulness under subsection 1681n(a)(1)(A) or examined any evidence of willfulness. *See e.g., Rausch v. Hartford Fin. Svcs Group,*

Inc., 2003 WL 22722061, *2, n. 1 (D. Or. Jul. 31, 2003) (the "Court does not reach the additional arguments in support of Defendants' Motion for Summary Judgment"), *rev'd on other grounds*, 435 F.3d 1081 (9th Cir. 2006).

The Ninth Circuit also did not consider the evidence of willfulness. Rather, it remanded for creation of a more complete record. *Reynolds*, 435 F.3d at 1099 ("[B]ecause the parties did not have an adequate opportunity to explore the issues in the district court, we remand for further proceedings.") Preliminarily, however, the court interpreted the statute to mean that petitioners could be found willful if a fact-finder eventually found *either* that petitioners knowingly or recklessly ignored the notice requirements of the FCRA.

III. PETITIONERS' MISSTATEMENTS AND SIGNIFICANT OMISSIONS

Petitioners' statements of the case contain significant omissions and misstatements that create the mistaken impression that the Ninth Circuit decided more than it did and that the records in these actions are more completely developed than they are. Certain developments post-dating the petitions also bear on the appropriateness of review.

Petitioners suggest either that they have been precluded from raising an advice of counsel defense or that the Ninth Circuit rejected this defense or ruled on it in ways that conflict with holdings of other circuits. However, in none of these cases is there a developed record on advice of counsel, and the Ninth Circuit did not rule on the defense. The Ninth Circuit merely made observations about the possible relevance of advice of counsel to willfulness and remanded for further proceedings. *Reynolds*, 435 F.3d at 1099. Those statements are *dicta* and not the source of any circuit conflict.

Indeed, for the last several years, petitioners made a tactical choice *not* to present a full-blown advice-of-counsel defense because they did not want to share the actual advice they received (which was almost certainly different from the

legal arguments they made to the district court and Ninth Circuit) and waive the attorney-client privilege as a result. Only on remand some petitioners recently raised the advice of counsel defense. The result may ultimately be a developed factual record and legal rulings based on it, but until then this case will not present any issues regarding advice of counsel suitable for appellate review, let alone review in this Court.

Petitioners also create the mistaken impression that these are certified class actions for punitive damages. Petitioners are wrong on both counts. Class certification issues are still before the trial court. In addition, respondents have stated on the record several times that they are not pursuing claims for punitive damages and have withdrawn those claims below or dropped them from amended complaints. Respondents repeat here that they are not seeking punitive damages. Respondents only seek the statutory damages (between $100 and $1,000) that Congress has provided for willful violations of the FCRA under subsection 1681n(a)(1)(A).

This Court also should be aware of certain developments that petitioners do not mention because they postdate the filing of the petitions. Most significantly, since the petitions were filed, petitioner Hartford Fire and respondent Reynolds have entered into a Memorandum of Understanding that settles the putative class case. While Hartford Fire has yet to withdraw its petition, it has agreed to do so once there is a class settlement finally approved by the district court.[2]

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[2] Other insurers have similarly settled the FCRA claims or chosen not to seek review of the Ninth Circuit's opinion. Nationwide Insurance Company settled an identical and related case before the Ninth Circuit even ruled on its case, for $280 per class member in statutory damages. In another appeal from a related case that the Ninth Circuit decided with these cases, Farmers Group Inc. chose not to seek *certiorari* from the Ninth Circuit's identical decision in their case. *See Ashby v. Farmers Group, Inc.*, No. 04-80084, Mem. Op. (9th Cir. Aug. 4, 2005).

REASONS FOR DENYING THE WRIT

I. THE PETITIONS ARE PREMATURE BECAUSE THEY ARISE OUT OF SUMMARY JUDGMENT, ARE BASED ON AN INCOMPLETE RECORD, AND THE FACTS ON WILLFULNESS HAVE NOT BEEN REVIEWED BY A LOWER COURT.

A. No Court Has Examined the Summary Judgment Facts on Willfulness.

It would be premature to address the meaning of willfulness in the current procedural context. These petitions arise out of summary judgment proceedings and, in the case of the *Safeco* appeal, a Fed. R. Civ. P. 54(b) judgment, and the disposition below was a remand for further proceedings in all cases. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 506 U.S. 946 (1993) (Scalia, J., respecting the denial of *certiorari*). The Court ordinarily limits its review of cases in an interlocutory posture to extraordinary circumstances, such as when it is necessary to prevent great inconvenience in the conduct of further proceedings. Robert L. Stern, et al., Supreme Court Practice § 4.18, at 258 (8th ed. 2002) (citing cases). The mere announcement of an abstract standard for willfulness to be applied at some point in the future does not cause great inconvenience or present extraordinary circumstances.

While Safeco, joined by all petitioners, contends that it presents a question of "enormous practical significance," it is difficult to believe that regulated persons are waiting for abstract guidance, without the benefit of how that guidance applies to any specific conduct, on whether they can be liable for either consciously or recklessly ignoring the FCRA. One would hope that corporations that enjoy the privilege of using consumer's personal banking information, credit information, social security information and other private data are not recklessly misusing such protected information in the hope

that recklessness will not suffice to make them liable under the statute. These are certainly not the "extraordinary circumstances" that should lead this Court to give guidance prior to a final resolution and in the absence of a well-developed record reviewed by the district court below.

Here, not only did this issue arise on summary judgment, but the lower courts have never even applied the law to any factual record. The district court decided these cases on alternative grounds and never considered the facts on willfulness. *See e.g., Rausch*, 2003 WL 22722061 at *2. The Ninth Circuit also did not decide the willfulness issue, but simply announced a general standard for willfulness to be applied on remand. *Reynolds*, 435 F.3d at 1099.

The meaning of the term "willful," as petitioners themselves point out, is abstract. This Court would provide little guidance to the lower courts if it simply announced an abstract definition without any corresponding application of that standard to a fully developed factual record. While the Ninth Circuit did its best to guide the district court by announcing a standard that could be applied to the facts on remand, the case will be in a better procedural posture, if still not a good candidate for Supreme Court review, once the factual record is developed and the district court has the opportunity to apply the standard to the facts — including the as-yet completely undeveloped record on what petitioners view as the critical issue of advice of counsel.

Indeed, there are many possibilities for these cases on remand. The district court may ultimately conclude that plaintiffs presented sufficient evidence that defendants "knowingly" violated the FCRA, providing evidence that goes beyond a reckless violation.[3] Thus, petitioners' request

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[3] The Safeco petitioners boldly predict that had this case been heard in other circuits, the decision granting summary judgment would be affirmed. Safeco Pet. 16. Because the courts below never examined the evidence on willfulness under any standard, this is pure, and likely inac-

(*Footnote continued*)

for a higher standard of knowing and willful conduct may ultimately be irrelevant if the court or a jury later concludes that defendants acted *both* knowingly and recklessly.

In addition, these cases may resolve by settlement. As noted above, petitioner Hartford Fire has already entered into an initial settlement with a putative class and will withdraw its petition once it is finally approved by the district court.

B. There is No Factual Record of an Advice of Counsel Defense.

Petitioners make many misstatements about the status of the advice of counsel defense. For instance, petitioner Safeco states that "the Ninth Circuit's refusal to recognize an advice of counsel defense under § 616 rests on a presumption of bad faith on the part of lawyers and clients that is unprecedented in the decisions of this Court." Safeco Pet. 22.

No petitioner, however, properly raised the "advice of counsel" defense in its summary judgment motions, and neither the district court nor the Ninth Circuit ruled on such a defense. There is no factual record of any advice of counsel defense.[4] Indeed, having prevailed on other arguments in the trial court, petitioners did not want to raise the defense and waive their attorney-client privilege unless and until they had no other supportable defense. Far from "refusing to recog-

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curate, speculation. While the district court did not reach the issue in these cases, the same court held in the related *Nationwide* case that plaintiffs would survive summary judgment even under a "knowing" standard. *Razilov v. Nationwide Mut. Ins. Co.*, 2004 WL 3090083 (D. Or. 2004).

[4] In its summary judgment papers in the trial court, GEICO did say it had consulted counsel, but it presented no evidence of what counsel advised, the timing of the consultation in relation to the conduct, or whether GEICO followed the advice. A defendant is not entitled to an advice of counsel defense "merely because he consulted an attorney in connection with a particular transaction"; he must also show that he disclosed the material facts to counsel and received advice on which he actually relied in good faith. *United States v. Rice*, 449 F.3d 887, 896-97 (8th Cir. 2006).

nize" an advice of counsel defense, the Ninth Circuit remanded the case so that petitioners could raise the defense on remand. *Reynolds*, 435 F.3d at 1099. In fact, petitioners Safeco and GEICO have now raised the defense on remand.

C. Recent Developments Since the Filing of the Petitions Confirm That the Facts of This Case Should Be Fully Developed and Not Subject to Piecemeal Review by This Court.

Developments that have taken place since the Ninth Circuit ruled further confirm that it would be premature to review these cases because of the uncertainties that exist prior to a full trial, complete factual record, and final dispositions of these cases. Not only has Hartford Fire entered into a settlement that, once approved, will moot its case before this Court could decide it, but the Safeco petitioners have now, for the first time, raised issues about whether two of the Safeco companies are proper parties to the case. These developments illustrate that the very identities of the parties are still in flux and highlight the substantial risks attendant to granting a writ of *certiorari* at an interlocutory stage of any case. This Court should not reach out to rule until it is clear that its decision will bind the appropriate parties. Without a settled record and final judgment, the landscape on remand below is constantly changing. Indeed, the parties are continuing to litigate class, discovery and other issues to this day.

II. THERE IS NO CONFLICT ON THE MEANING OF WILLFULNESS.

Petitioners maintain that this case merits review because, they claim, there is a circuit conflict regarding the meaning of a willful violation under the FCRA. Despite the Ninth Circuit's reference to a split of authority, a careful review of the statute and case law reveals there is no well-developed circuit conflict with respect to the definition of a willful violation for the particular statutory subsection at issue here, 15 U.S.C. § 1681n(a)(1)(A). The cases that petitioners cite either (a) refer

to the *mens rea* requirements for violations of sections 1681n(a)(1)(B) or 1681n(b), which both expressly require proof of a "knowing" violation, (b) involve the issue of punitive damages under section 15 U.S.C. §1681n(a)(2), or (c) otherwise do not analyze the particular statutory language at issue here. Moreover, the great majority of the cases petitioners cite do not expressly address the issue of "reckless disregard" at all, belying petitioners' claims of a mature conflict among the circuits over that specific issue.

A. The Ninth Circuit's Statutory Interpretation Is Firmly Grounded in the Statutory Language

Before turning to the claimed circuit conflict, respondents briefly review the statutory language. The claimed conflict largely disappears when it is understood that the FCRA has several different remedial subsections under the FCRA.[5]

Respondents' claims arise under 15 U.S.C. § 1681n (a)(1)(A), which provides that any person who "willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of — (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000, whichever is greater." In contrast to other FCRA sections, this subsection does not require proof of a knowing violation.

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[5] Except for State Farm, petitioners conveniently refer either to the entire section 616n of the original bill or to the codified section 1681n without addressing the several subsections with different remedial provisions and different language under 1681n. Petitioners' failure to engage in statutory analysis at the textual level of each subsection is revealing. State Farm incongruously argues that the term "willful" when used alone must mean "willful and knowing" even when Congress clearly distinguished between those distinct terms by requiring proof of only a "willful" violation for a claim under subsection 1681n(a)(1)(A), but requiring proof of both a "willful and knowing" violation in the immediately following remedial subsections of the FCRA. *See* State Farm Pet. 26-28.

The very next subsection, 1681n(a)(1)(B), provides for actual damages or at least $1,000 in statutory damages as well as punitive damages for a violation that is not only "willful" but also involves "obtaining a consumer report under false pretenses *or knowingly without a permissible purpose*" (emphasis added). Similarly, section 1681n(b) imposes liability on "any person who obtains a consumer report from a consumer reporting agency under false pretenses or *knowingly without a permissible purpose*" (emphasis added). In addition, Congress provided criminal liability under section 1681q for "any person who *knowingly and willfully* obtains information on a consumer * * * under false pretenses." 15 U.S.C. § 1681q (emphasis added). The references to willful *and* knowing violations would be superfluous if the definition of willful already required knowingly wrongful conduct.

Congress plainly understood that a merely willful violation requires something less than proof of a willful *and* knowing violation because it expressly required proof of a knowing violation or of both a "willful and knowing" violation in other civil and criminal subsections. When Congress wanted to require proof of a knowing violation of FCRA, it knew how to do so. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (stating that Congress "says in a statute what it means and means in a statute what it says there.") With respect to section 1681n(a)(1)(A), it did not. *See United Dominion Indus. Inc. v. United States*, 532 U.S. 822, 836 (2001) (noting the logic of investing significance in a notable omission of words in determining Congressional intent). Thus, the Ninth Circuit's conclusion that a willful violation does not require proof of a knowing violation is fully consistent with standard statutory interpretation.

Petitioners contend that the legislative history demonstrates that the Ninth Circuit's definition of willfulness is incorrect. But because the statutory text is clear, there is no need to consult legislative history. *Department of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 132-33 (2002).

Even if this Court were interested in legislative history, petitioners fail to cite the most directly relevant indication in that history of Congress's understanding of the meaning of "willful" conduct. In an early version of 15 U.S.C. 1681q, Congress provided criminal liability for "whoever willfully violates any provision" of the FCRA. H.R. 19410, 91st Cong., Sec. 62 (1970). Congress eventually added a "knowing and willful" criminal *mens rea*, indicating that Congress understood "willful" to mean something less than "knowing and willful" for purposes of this statute. The statute's evolution thus confirms the Ninth Circuit's interpretation of the text.

Given the language and history of the statute, the Ninth Circuit's conclusion that "willfulness" under subsection 1681n(a)(1)(A) incorporates both knowing and reckless disregard of a defendant's legal obligations is fully consistent with this Court's construction of "willfulness" in statutes dating back to the 1930s. *See Reynolds*, 435 F.3d at 1098; *see, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (a willful violation of the Age Discrimination in Employment Act requires only a "reckless disregard for the matter of whether its conduct was prohibited"); *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (stating same knowing or reckless standard); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43 (1938) (holding that civil defendant's conduct was "willful" because it showed disregard for statute and indifference to its requirements). The standard statutory definition for willful (where willful is not more specifically defined in the statute) has been settled in this Court for decades and does not need revisiting.[6]

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[6] State Farm mistakenly relies on *Kawahaauhau v. Geiger*, 523 U.S. 57, 60 (1998), in which this Court was interpreting the meaning of the bankruptcy statutes that excepts "willful and malicious injury" from bankruptcy discharge. The statute here does not require the additional element of a "malicious" injury

B. There Is No Circuit Conflict with Respect to 15 U.S.C. § 1681n(a)(1)(A).

1. The other circuits do not address the particular language of Section 1681n(a)(1)(A).

Turning to the claimed circuit conflict, a close look at the cited opinions reveals there is no direct conflict with respect to the interpretation of the text of the particular statutory subsection, 15 U.S.C. § 1681n(a)(1)(A), at issue here. In *Phillips v. Grendahl*, 312 F.3d 357, 365 (8th Cir. 2002), the only case cited by petitioners that explicitly criticizes the use of a "reckless disregard" standard under any subsection of the FCRA, the Eighth Circuit noted that the plaintiff had not clearly alleged which statutory subsection the defendant violated, but ultimately concluded that the plaintiff was alleging a violation of section 1681n(a)(1)(B), which, as noted above, expressly requires proof of obtaining a consumer report not only "willfully," but also "under false pretenses or knowingly without a permissible purpose."

Similarly, in *Duncan v. Handmaker*, 149 F.3d 424, 426 (6th Cir. 1998), the plaintiff "sought to hold defendants civilly liable for procuring the [plaintiffs'] consumer reports under false pretenses." The Sixth Circuit noted that plaintiffs invoked a prior version of the statute that provided civil liability for violation of the criminal section, 1681q, "which criminalizes the act of knowingly and willfully obtaining information under false pretenses." 149 F.3d at 426, n 1. Several other circuits also specifically analyze 15 U.S.C. § 1681q, which "imposes criminal liability upon any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses." *Zamora v. Valley Fed. Sav. & Loan Ass'n of Grand Junction*, 811 F.2d 1368, 1370 (10th Cir. 1987). *See also Bakker v. McKinnon*, 152 F.3d 1007, 1010 (8th Cir. 1998) (analyzing a claim for a violation of section 1681(q)); *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 971-72 (4th Cir. 1987) (analyzing knowing or false pretense

standard under section 1681q).[7] These circuits' requirement of proof of a knowing violation under a different statutory subsection, 1681q, are consistent with the Ninth Circuit's interpretation of subsection 1681n(a)(1)(A).

The remaining cases relied upon by petitioners fail to interpret the particular text of subsection 1681n(a)(1)(A) or broadly refer to Section 1681n without any substantive textual analysis. *See Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 417-418 (4th Cir. 2001) (citing generally section 1681n and 1681o and failing to address the specific statutory language); *Ausherman v. Bank of America Corp.*, 352 F.3d 896, 900 (4th Cir. 2003) (following *Dalton* without textual analysis); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 833 (7th Cir. 2004) (citing generally section 1681n and stating only that proof of punitive damages requires proof of a knowing and intentional violation); *Ruffin-Thompkins v. Experian Info. Solutions*, 422 F.3d 603, 610 (7th Cir. 2005) (citing *Wantz* and section 1681n generally); *Bagby v. Experian Info. Solutions*, 162 Fed. Appx. 600, 605 (7th Cir. 2006) (same); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293-94 (5th Cir. 1993) (generally referring to "[s]ection 1681n [which] authorizes the court to award actual damages, punitive damages and reasonable attorney fees * * *.") Moreover, in none of these cases did the courts specifically address the question of "reckless disregard" as an avenue of proving willfulness, let alone reject it.

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[7] Petitioners also claim that the Ninth Circuit's opinions conflict with an unpublished Ninth Circuit opinion, *Arriola v. Safeco*, 1993 WL 530480 (9th Cir. 1993). Intra-circuit conflicts are generally not a ground for certiorari, and because *Arriola* is non-precedential, there is no intra-circuit conflict in any event. Moreover, petitioners made this same argument to no avail when requesting that the Ninth Circuit rehear these cases *en banc*. *Arriola* involved the criminal liability section 1681q which requires proof of both a willful and knowing violation. *Arriola*, 1993 WL 530480, *1. Likely recognizing the absence of any conflict, the Ninth Circuit denied *en banc* rehearing in all cases.

Further, a number of the circuits that discuss a willful violation of section 1681n, even if vaguely and without analysis of the statutory language of the particular subsections, do so in the context of resolving a claim for punitive damages under section 1681n(a)(2). The Fourth and Fifth Circuits (and a number of later cases) expressly rely on an earlier Fifth Circuit case, *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987). *See Dalton*, 257 F.3d at 418 (quoting *Pinner*); *Stevenson*, 987 F.2d at 293-94 (quoting and relying on *Pinner*); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001) (quoting *Pinner* in case involving jury award of $4.47 million for willful violation). *See also Northrop v. Simsbury, Inc.*, 12 Fed. Appx. 44, 50 (2d Cir. 2001) (failing to analyze statutory text and reviewing claim for punitive damages based on willful violation); *Casella v. Equifax Credit Info. Svc's*, 56 F.3d 469, 476 (2d Cir. 1995) (same), *cert. denied*, 517 U.S. 1150 (1996); *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 753 (5th Cir. 2002) (analyzing punitive damages); *Wantz*, 386 F.2d at 833 (same). In *Pinner*, the definition of willfulness adopted by the court was based on the requirements for proof of punitive damages under section 1681n(a)(2). The court focused on whether the jury had sufficient evidence to award punitive damages:

> 'Willful' is a word of many meanings — its construction often influenced by its context. But here, there is simply nothing to even suggest that [defendants] willfully set out to do Pinner harm. There is no evidence that they knowingly and intentionally committed an act in conscious disregard for the rights of others. The jury's award of punitive damages lacked any evidentiary support whatsoever.

805 F.2d at 1263. Unlike *Pinner* and its progeny, the cases at issue do not involve any claim for punitive damages as respondents, plaintiffs below, seek only statutory damages.

We have no quarrel with *Pinner*. The meaning of willful is often influenced by context. As State Farm argues, this Court has examined statutory terms such as willful "both in the immediate context in which it is used and the context of provisions in which it is embedded." *See* State Farm Pet. 24 (citing *Bryan v. United States*, 524 U.S. 184, 191 (1998)). Indeed, in *Bryan*, this Court noted that a willful *mens rea* may include "careless disregard" for the rights of others. 524 U.S. at 191, n. 12. Here, Section 1681n(a)(1)(A)'s use of the term "willful," without reference to knowledge, means something less than a knowing violation in the context of the "other provisions in which it is embedded," which include Congress's express requirement of proof of a "knowing and willful" violation under sections 1681q and 1681n(a)(1)(B).

2. The Ninth Circuit's definition of willful is consistent with other circuits' definitions.

The Ninth Circuit's definition of a willful violation under section 1681n(a)(1)(A) expressly relies upon and is entirely consistent with the Third Circuit's definition. *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226-27 (3d Cir. 1997).[8] In *Cushman*, the Third Circuit noted that plaintiff could prove her FCRA violation if she proved either that the defendant credit reporting agency took action "knowing that policy to be in contravention of the rights possessed by consumers or in reckless disregard of whether the policy contravened those rights." *Id.* at 227. This is the same standard expressly adopted by the Ninth Circuit. *Reynolds*, 435 F.3d at 1097. Petitioner Safeco incredibly tries to create a circuit conflict out of whole cloth by claiming that even the Third Circuit's interpretation in "*Cushman* cannot plausibly be said to hold that 'reckless disregard' satisfies the 'willfulness' standard under § 616." Safeco Pet. 17, n 7. On the contrary, the Third

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[8] *Cushman* itself involves punitive damages and does not directly address the specific issue in this case, liability under § 1681n(a)(1)(A).

Circuit's express holding that proof of "reckless disregard" satisfies the statute cannot be read any other way. Significantly, in light of petitioners' assertion of a raging conflict over this issue, *Cushman* has not been rejected, criticized, or even distinguished by any other court of appeals in a case under section 1681n (a)(1)(A) in the nearly ten years since the case was decided; indeed, the decision below and *Phillips*, which addressed a claim under section 1681n(a)(1)(B), appear to be the only appellate decisions ever to have discussed *Cushman's* recklessness holding.

Moreover, the Third Circuit's interchangeable use of the terms "conscious disregard" and "reckless disregard" indicates that the Circuits do not find these terms significantly different. *Cushman*, 115 F.3d at 226-227 (citing *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996), and *Pinner*, 805 F.2d at 1263). Similarly, the Ninth Circuit expressly held that the willfulness standard involves "'a conscious disregard' of the law, which means either 'knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Reynolds*, 435 F.2d at 1098, *quoting Cushman*, 115 F.3d at 227. Except for *Phillips*, which involved subsection 1681n(a)(1)(B), petitioners cite no court that has expressly disagreed with the Ninth and Third Circuits and held that "conscious disregard" and "reckless disregard" are mutually exclusive under this statute, and thus opinions that merely mention "conscious disregard" cannot be interpreted as conflicting with the decision below (or with *Cushman*).

C. The State Farm Petitioners Did Not Raise the "Willfulness" Issue Below and Cannot for the First Time Before This Court.

State Farm acknowledges that the willfulness issue was not decided below in its case, but still contends that it may raise that issue solely because the Ninth Circuit based its unpublished *State Farm* opinion on its resolution of *other* issues

in its published *Reynolds* opinion. State Farm Pet. 29 n.15. State Farm contends that *every* issue raised in *Reynolds*, including willfulness, is therefore a proper issue for review in *State Farm*. That is not the law. State Farm argued to the Ninth Circuit only that (1) State Farm Fire did not take an "adverse action" against respondent Willes and (2) State Farm Mutual did not reject Willes's application because, according to State Farm, she only applied to State Farm Fire. *See* State Farm Appellees' Br. 2 (Issues Presented for Review). State Farm did not argue willfulness in its brief, and its petition does not even claim it did,[9] nor did the Ninth Circuit mention willfulness in its *State Farm* memorandum. Having neither been raised nor decided below, the issue is not properly before this Court in the State Farm petition. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148, n. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

D. The Ninth Circuit Did Not Resolve Any Advice of Counsel Defenses.

Having failed to create a credible circuit split on the definition of "willful" for the purposes of Section 1681n(a)(1)(B), petitioners try to redefine the Ninth Circuit's standard as a mere negligence standard through their discussion of a red-herring issue — the *potential* "advice of counsel" defense for which there is no factual record.

Because the Ninth Circuit did not rule on the advice of counsel defense, its observations about the subject are *dicta* and could not form the basis for any claim of a circuit split. Even as *dicta*, the Ninth Circuit's observations are not "extreme," as petitioners suggest. The Ninth Circuit merely stated that "neither a deliberate failure to determine the ex-

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[9] State Farm belatedly raised the issue when seeking *en banc* rehearing, which the court denied in *State Farm* without reaching this issue.

tent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement." *Reynolds*, 435 F.3d at 1099. The Ninth Circuit's view is entirely consistent with the settled principle that an advice of counsel defense cannot prevail if the defendant did not honestly believe the advice received was proper but instead had "reason to doubt" it. *United States v. Mathes*, 151 F.3d 251, 255 (5th Cir. 1998), *cert denied*, 525 U.S. 1059 (1998) (citation omitted). A blatant inconsistency between the purported advice and the clear terms of a statute would clearly be a relevant consideration in assessing such a defense. Petitioners pull out of context individual words such as "unreasonable" to create the impression that the Ninth Circuit adopted a negligence standard, when the Ninth Circuit was only guiding the district court to look at the extent of "the obviousness or unreasonableness of the erroneous interpretation." *Reynolds*, 435 F.3d at 1099. Indeed, the Ninth Circuit expressly rejected a negligence standard. 435 F.3d at 1097-98 (citing *McLaughlin*, 486 U.S. at 133 (noting that willful conduct is not merely negligent)).

Rather than credibly arguing that this *dicta* somehow creates a conflict in the law, petitioners favor sweeping statements of hyperbole that the Ninth Circuit has somehow prejudged the evidence. To that end, State Farm argues:

> Under the Ninth Circuit's decision, factors that normally favor a finding of an absence of willfulness and/or recklessness as a matter of law are turned on their heads, all in service of a jaundiced and unsupported view of how business and companies formulate their conduct in regulatory and compliance contexts and how lawyers view their obligations to their clients and the legal system.

State Farm Pet. 29. The purportedly skewed "factors" (actually standard and neutral tests for proving willful misconduct) do not prejudge the conduct of petitioners or their at-

torneys because the Ninth Circuit did not reach the evidence, much less find that petitioners acted willfully "as a matter of law." The court reached no conclusion as to how petitioners' lawyers "view[ed] their obligations to their clients and the legal system," precisely because petitioners have not yet offered any evidence of their lawyers' advice. Indeed, for all we know, their lawyers may have given proper direction on how to follow the law, which petitioners disregarded.

The Ninth Circuit's *dicta* concerning advice of counsel is also not in conflict with *Thurston*, 469 U.S. at 128. In *Thurston*, this Court concluded that the defendants had not willfully violated the ADEA because defendants had offered evidence that they had consulted with their attorneys in *good faith* to determine if a retirement policy in a massive collective bargaining was proper. *Thurston* expressly held that "the record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." 469 U.S. at 129. Here, by contrast, there is no record of any petitioner's consultations with attorneys (whether in good faith or not), and the Ninth Circuit stated, consistently with *Thurston*, that "[a] company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous interpretation of the statute." 435 F.3d at 1099.

Petitioners also contend, without record support, that the after-the-fact legal *arguments* they made to the district court and the Ninth Circuit reflected the same legal *advice* on how to comply with the FCRA that they received from counsel at the time of the conduct giving rise to the violations, and they leap from that unfounded factual premise to the conclusion that their reliance on counsel could not have been reckless or even unreasonable simply because the district court later erroneously accepted their interpretation of "adverse action" under FCRA (an interpretation held by the Ninth Circuit to

be contrary to the plain meaning of the Act). As support for this argument, and to suggest a conflict with decisions of this Court, petitioners cite *Professional Real Estate Investors v. Columbia Pictures Ass'n*, 508 U.S. 49 (1993) ("*PREI*"), which they say holds that a legal position accepted by a district court cannot, as a matter of law, be unreasonable.

PREI, however, has no bearing on this case. *PREI* concerns the "sham" exception to antitrust immunity and holds only that judicial findings that a litigant has objectively reasonable grounds for litigating preclude a finding that the litigation was a sham. More generally, the *PREI* Court observed, in a footnote cited by petitioners, that a "winning lawsuit" cannot be objectively unreasonable. *Id.* at 57 n.5. But litigation in which a party's arguments are rejected on appeal can hardly be termed "winning." Nowhere does *PREI* or any other case cited by petitioners hold that an after-the-fact argument raised in litigation in defense to a statutory violation provides an absolute advice of counsel defense as long as a district court initially (but erroneously) agrees with the argument. Indeed, legal advice received after the conduct cannot support a defense of lack of willfulness. *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253, 1259 (Fed Cir. 1997), *cert denied*, 523 U.S. 1071 (1998).

Petitioners also cannot cite a single case holding that a defendant cannot be liable *as a matter of law* for a willful violation on an issue of first impression, particularly where, as here, the statute is unambiguous on its face, and there is evidence that petitioners were instructed on how to comply with the statute by specific FTC advisories, understood they had to comply, and had notice from prior case law that discussed the issue without definitively deciding it.[10]

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[10] *See e.g.*, FTC "Prescribed Notice of User Responsibilities," 16 C.F.R. Pt. 601, App. C (stating in July 1997 that "adverse actions include all business, credit, and employment actions affecting consumers that can be considered to have a negative impact * * *"); March 1, 2000 letter

(*Footnote continued*)

In *Reich v. Gateway Press*, 13 F.3d 685, 701 (3d Cir. 1994), relied upon by petitioners, the Third Circuit affirmed the district court's conclusion that there was evidence that the defendant reasonably believed it was complying with the law and, therefore, was not willful. While the court noted that this was an issue of first impression and considered that a factor in determining willfulness, it did not hold that a defendant can never willfully violate a statute unless that statute has been previously interpreted. Such a sweeping conclusion would give all regulated persons the right to violate any statute with impunity until it has first been interpreted by a court. There is no case so holding and no conflict in either this Court's or the court of appeal's case law on this point.[11]

Finally, the evidence below, though not fully developed, indicated that petitioners' legal arguments in this litigation were directly contrary to their understanding at the time of their conduct. For instance, petitioner Hartford Fire argued to

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from FTC's Hannah Stires to James Ball (providing notice to insurance companies in March 2000 that failing to offer best price or discount in response to initial application for insurance was adverse action); FTC Notice, "Consumer Reports: What Insurers Need to Know" (stating in October 1998 that adverse action occurs when initial applicant denied coverage at standard rates). *See also Mick v. Level Propane Gasses, Inc.*, 1999 WL 33453772 (S.D. Ohio 1999) (stating in the context of a class action decision that offering an initial applicant less favorable credit terms based on credit information may be adverse action under FCRA).

[11] *Stevenson v. TRW, Inc.*, 987 F.2d at 296, notes that the defendant did not have prior guidance that its notice of consumer rights was deficient, but it does not hold that the statute had to be interpreted by a court first. In *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995), the court exercised its discretion to deny punitive damages where prior maritime law decisions provided no specific guidance to the defendant. In *Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985), the court held that a defendants' reliance on certain appellate rulings was reasonable in light of a circuit-split that had not been resolved. None of these fact-bound decisions holds that a defendant cannot, as a matter of law, willfully violate a statute that has not been interpreted.

the district court and the Ninth Circuit that "an insurer does not take 'adverse action,' ... when the insurer charges a specific insured an initial premium on a new policy that is higher than the best rate available." Hartford Resp. Br. 9. However, *at the time of the conduct at issue*, Hartford Fire instructed its agents that "[t]he FCRA, which is applicable in all states, requires an adverse action notice for consumers not receiving our best rate."[12] The record on review does not support petitioners' unsupported assumption that the after-the-fact legal arguments that they made below necessarily reflected their subjective understanding at the time they violated the FCRA.

III. THIS CASE LIKELY WILL NOT HAVE WIDESPREAD IMPACT IN LIGHT OF DECISIONS HOLDING THAT A RECENT FCRA AMENDMENT HAS PROSPECTIVELY ELIMINATED THE CLAIMS ASSERTED HERE.

Contrary to petitioners' predictions, there is substantial doubt that these cases will have major ongoing impact in light of recent decisions holding there is no longer a private civil right of action under section 1681n for violations of section 1681m, the "adverse action" notice requirement. Petitioners fail to inform this Court that at least eleven courts, including the Seventh Circuit and several district courts within the Ninth Circuit, have held that a 2003 amendment to the FCRA, the Fair and Accurate Credit Transactions Act (FACTA), eliminated private rights of action for violations of 15 U.S.C. § 1681m that postdate FACTA. *See* 15 U.S.C. 1681m(h)(8)(A) (stating that section 1681n shall not apply to violations of this section and providing exclusive enforcement by federal agencies); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 950 (7th Cir. 2006); *Putkowski v. Irwin Home*

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[12] Attached to Appellants' Response to Appellees' Second Amended Petition for Rehearing *En Banc*, *Reynolds v. Hartford Fire*, Ninth Circuit Case No. 03-35695.

Equity Corp., 423 F.Supp. 2d 1053, 1061-62 (N.D. Cal. 2006); *Phillips v. New Century Fin. Corp.*, 2006 WL 517653, *3-4 (C.D. Cal. Mar. 1, 2006); *White v. E-Loan, Inc.*, 409 F. Supp. 2d 1183, 1187 (N.D. Cal. 2006); *Harris v. Fletcher Chrysler Prods.*, 2006 WL 279030, *3 (S.D. Ind. Feb. 2, 2006); *Stavroff v. Gurley Leep Dodge*, 413 F. Supp. 2d 962, 967 (N.D. Ind. 2006); *Murray v. Household Bank (SB)*, 386 F. Supp. 2d 993, 999 (N.D. Ill. 2005); *Bonner v. Home123 Corp.*, 2006 WL 1518974, *5 (N.D. Ind. May 25, 2006) ("*Bonner I*"); *Bonner v. CorTrust Bank*, 2006 WL 1980183, *3 (N.D. Ind. July 12, 2006) ("*Bonner II*"); *Crowder v. PMI Mortgage Ins. Co.*, 2006 WL 1528608, *2-5 (M.D. Ala. May 26, 2006); *Cavin v. Home Loan Ctr.*, 2006 WL 1313191 (N.D. Ill. May 10, 2006); *but see Barnette v. Brook Road*, 429 F. Supp. 2d 741, 748 (E.D. Va. 2006) (rejected in *Bonner I*, *Crowder*, *Bonner II*, and *Cavin*).

As the Seventh Circuit explained in *Murray*:

> A recent amendment to the Act abolishes private remedies for violations of the clear-disclosure requirement, which in the future will be enforced administratively, but that change does not apply to offers made before its effective date and thus does not affect this litigation. See 117 Stat.1952, adding 15 U.S.C. § 1681m (h)(8).

434 F.3d at 950. Respondents take no position about the correctness of these decisions, but they at least cast serious doubt on petitioners' assertion that the Ninth Circuit's decision will unleash a flood of new litigation under the FCRA.

While petitioners fail to mention these cases, they provide vague, misleading and incomplete citations to recently filed cases that are intended to give this Court the mistaken impression that there has been an explosion of litigation under section 1681n(a)(1)(A) as a result of the Ninth Circuit's ruling. Petitioners' purported support for such groundless claims is merely a reference to dockets of cases in which plaintiffs purportedly included a claim under section 1681n of the FCRA without identifying which subsection is at issue.

Safeco Pet. 13, n.5; Hartford Pet. 23. These references fail to demonstrate any connection between the Ninth Circuit's opinion and the recently filed cases. Undoubtedly, there have been many cases filed under the FCRA in federal courts for over thirty years because the statute regulates many different entities, including, most comprehensively, the credit bureaus that provide credit information. Petitioners' attempt to attribute an increase in litigation to the Ninth Circuit's opinion is pure speculation. As noted above, it is more likely that there has been or will be a decline in the filing of these types of cases because the courts have held that the claims at issue here have been eliminated by t FACTA.

IV. PETITIONERS' REMAINING CHALLENGES TO THE NINTH CIRCUIT'S RULING ON "ADVERSE ACTION" UNDER THE FCRA DO NOT MERIT REVIEW.

State Farm and GEICO also seek review of the Ninth Circuit's interpretation of "adverse action" under the FCRA. Neither State Farm nor GEICO contends that the Ninth Circuit's statutory interpretation conflicts with the law of this Court or any other circuit. As the Ninth Circuit correctly noted, no other circuit has addressed the definition of "adverse action" under section 1681a(k)(1)(B)(i). *Reynolds*, 435 F.3d at 1091. Moreover, the Ninth Circuit's interpretation is consistent with the Sixth Circuit's interpretation of a similar notice provision in the Truth in Lending Act ("TILA"). *See Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001) (holding TILA's notice requirements are triggered when a credit customer is charged more than he otherwise would have been if he had paid in cash). State Farm and GEICO do not provide any "compelling reasons" for review. Their arguments are solely directed at correction of a supposed error and without merit in any event.

A. State Farm Misinterprets the Statute.

The FCRA provides that an insurance company must give notice if it takes an adverse action against any consumer "based in whole or part on any information contained in a consumer report." 15 U.S.C. § 1681m (a). The definition of "adverse action" includes "an increase in any charge, or a reduction or other unfavorable change in the terms of * * * any insurance, *existing or applied for* in connection with the underwriting of insurance" 15 U.S.C. § 1681a(k)(1)(B) (emphasis added). Thus, the definition includes an increase in either a renewal or an *initial* applicant's charge for insurance. Eviscerating FCRA's purpose of providing notice when consumers are charged more based on the review of their private credit information, the district court held that an increase could only occur if an applicant initially applied for insurance, received a premium quote, and then that initial quote was later increased based on the applicant's credit information. State Farm continues to assert this position on review.

As the FTC made clear in an amicus brief before the Ninth Circuit on this narrow issue, "[t]his is absurd since it assumes that an insurer would make a formal offer of insurance to a consumer and then, after making that offer, would evaluate the consumer's insurability." FTC Amicus Br. 14 (filed in Ninth Circuit in *Willes v. State Farm*, Case No. 03-35848). The Ninth Circuit agreed and correctly held that an increase occurs when the consumer is charged more for insurance "based in whole or part" on credit information — in other words, the consumer is entitled to notice if she would have received a lower rate if she had a better qualifying credit score or other relevant credit information. *Reynolds*, 435 F.3d at 1093.[13] This holding is not radical. Indeed, this is

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[13] State Farm misleadingly states that the Ninth Circuit requires notice to everyone who does not have "perfect credit." State Farm Pet. 18. That is not the standard. The insurance companies themselves set the credit scores at which consumers will be charged more for insurance, and

(*Footnote continued*)

the understanding that petitioner Hartford Fire, and likely all petitioners, had when it instructed its agents that "[t]he FCRA, which is applicable in all states, requires an adverse action notice for consumers *not receiving our best rate*." *See* footnote 12, *supra*. It is also the position that the FTC staff, well before this lawsuit, had taken for years based on a plain reading of the statute. *See* footnote 10, *supra*. A contrary rule would permit insurance companies to increase rates charged millions of consumers for insurance, perhaps based on inaccurate information, without giving consumers any notice or opportunity to confirm that their rates were being increased based on accurate information. *Reynolds*, 435 F.3d at 1092.[14]

B. The GEICO Petitioners Misstate the Ninth Circuit's Holding.

In an attempt to make the Ninth Circuit's straightforward statutory interpretation appear extreme, the GEICO petitioners simply misrepresent it. The GEICO petitioners argue that the Ninth Circuit's ruling requires that insurance companies give notice to consumers "even though their credit informa-

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do not require a perfect score for the best rate. Thus, if an insurance company charges anyone who has a credit score under 700 (on a scale of 850) more for their insurance, only those consumers are entitled to notice.

[14] State Farm also contends that the Ninth Circuit erred in holding one of its companies, State Farm Mutual, could be liable under FCRA, because, it asserts, respondent Willes only applied to State Farm Fire. In *Reynolds*, the Ninth Circuit, relying on the plain language of FCRA making "any person" who takes an adverse action liable for a failure to give notice, 15 U.S.C. § 1681m (a), held that when an insured seeks insurance from a family of companies, and when each of them might have offered insurance depending on the applicant's credit score, each company may be liable for violating FCRA's notice requirements if an adverse action (premium increase or denial of insurance) is not disclosed. 435 F.3d at 1095-97. The court applied this ruling in *State Farm*, holding that because State Farm Mutual denied Ms. Willes a policy because her credit score was not higher, it could be liable under FCRA. State Farm does not contend that this common-sense, fact-bound ruling is in conflict with any other appellate decisions. The issue plainly does not merit review.

tion had either no impact or a favorable impact on the rates or terms provided." GEICO Pet. 25. The Ninth Circuit actually held just the opposite: that notice is only required if a "consumer pays a higher rate because his credit rating is less than the top potential score." *Reynolds*, 435 F.3d at 1093. That is, the consumer is only entitled to notice when his premium is increased above what it would have otherwise been "based in whole or in part" on a review of his credit information." 15 U.S.C. § 1681m(a). In any event, GEICO's incorrect contention that Edo somehow benefited from GEICO's review of his credit information, which resulted in a higher charge, is truly a quarrel with the Ninth Circuit' application of law to fact, and not an issue meriting review here.

C. The Ninth Circuit's Opinion Does Not Impose New Notice Requirements Under the FCRA.

Finally, Hartford Fire, in an argument presented as an afterthought, contends that the Ninth Circuit imposed new notice requirements on insurers. It did not. The Ninth Circuit's ruling on the adequacy of Hartford's notices was based simply on the fact that "[t]hey did not tell [the insured] that any adverse action had been taken against him" and thus did not comply with a bedrock requirement on the face of the statute. *Reynolds*, 435 F.3d at 1095. The Ninth Circuit's further descriptions of the statutory notice requirements are *dicta* that merely restate and explain in plain English the notice requirements set forth in section 1681m(a) of the FCRA. Hartford Fire does not contend, and cannot, that there is any circuit conflict on this issue, any conflict with the precedents of this Court, or any other proper reasons why this is an issue worthy of this Court's review. In any event, because the Hartford petitioners are settling, there is no need to resolve the issue in this case.

CONCLUSION

For the reasons stated above, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

SCOTT A. SHORR
Counsel of Record
N. ROBERT STOLL
STEVE D. LARSON
STOLL STOLL BERNE LOKTING
& SHLACHTER, P.C.
209 Southwest Oak Street
Suite 500
Portland, Oregon 97204
(503) 227-1600

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Respondents

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IN THE

Supreme Court of the United States

GEICO GENERAL INSURANCE COMPANY,
GEICO INDEMNITY COMPANY, and
GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioners,

v.

AJENE EDO.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

ROBERT D. ALLEN*
MELONEY CARGIL PERRY
JAY F. UTLEY
BRANDON P. LONG
BAKER & MCKENZIE LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 978-3000

* *Counsel of Record*

Attorneys for Petitioners

203257

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioners' statement pursuant to Rule 29.6 was set forth at page iii of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I. Preliminary Statement

Multiple groups of insurance companies—all of whom are competitors—have filed four petitions for writs of certiorari, asking this Court to review the same (or related) issues arising out of the same Ninth Circuit opinion. Diverse groups of amici curiae representing various segments of the United States economy have also submitted briefs demonstrating how the Ninth Circuit's opinion threatens to do substantial harm not only to the insurance industry but to the mortgage industry, governmental instrumentalities, employers, employees, consumers, and others as well. And on the *same day* that Respondents' Brief in Opposition was filed, Respondent Ajene Edo ("Edo") filed a "Notice of Withdrawal of Punitive Damages Claim" in the district court. His last-minute attempt to distance his willfulness claim from punitive damages is transparent. He did so in an effort to gloss over a clear split among the circuits by arguing to this Court that he does not seek punitive damages and that, therefore, the case law determining willfulness in the context of punitive damages is distinguishable. This reply is offered to address the following issues:

- **Now is the time for review.** The important questions presented in GEICO's petition are dispositive questions of pure statutory interpretation. This case comes to the Court in the same procedural posture as another case where the Court granted certiorari to determine the meaning of "willfully" in another statute. And here—as reflected by the settlements that Respondents announce in their Brief in Opposition—the stakes are much higher.
- **Even the Ninth Circuit acknowledged the circuit split.** While Respondents argue that there is no circuit split, even the Ninth Circuit acknowledged the circuit split between, at a minimum, the Third Circuit and the Sixth and Eighth Circuits regarding the standard for determining willfulness under 15 U.S.C. § 1681n.
- **A willfulness finding under the Ninth Circuit's erroneous standard still subjects a defendant to "crushing liability," even without punitive**

damages. Although Edo withdrew his punitive-damages claim, doing so did not change the fact that a willful violation of the Fair Credit Reporting Act still subjects a defendant to what Justice Kennedy has called "crushing liability" for uncapped statutory damages, *even in the complete absence of actual damages.* And even though, as of August 21, 2006, Edo no longer seeks punitive damages in this case, willfulness remains the standard for an award of punitive damages under § 1681n(a).

II. Argument and Authorities

A. Now is the time for review.

1. The willfulness question presented by GEICO is an important, clear-cut issue of pure statutory interpretation that is fundamental to the further conduct of this case and numerous other cases.[1]

Respondents' primary argument is that "[i]t would be premature to address the meaning of willfulness in the current procedural context" because, according to Respondents, the Ninth Circuit merely announced an "abstract" or "general" standard for determining willfulness and this Court purportedly needs a developed factual record before it can provide any "useful guidance" and "bind the appropriate parties."[2] But how willfulness is defined under 15 U.S.C. § 1681n of the Fair Credit Reporting Act ("FCRA") is a question of *pure statutory interpretation* that arises out of a patently incorrect Ninth Circuit opinion and that is fundamental to (if not dispositive of) the further conduct of this case, the related cases, and many other cases pending all over the country.

This Court's precedent "make[s] clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts."[3] Review may be granted where "there is some

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1. Petitioners, Government Employees Insurance Company, GEICO General Insurance Company, and GEICO Indemnity Company are collectively referred to herein as GEICO. Also, because Edo joined with Respondents in the three other related cases to file a joint Brief in Opposition, GEICO refers to Respondents collectively throughout this reply.

2. Respondents' Br. in Opp'n 2, 8-9, 11.

3. *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997).

important and clear-cut issue of law that is fundamental to the further conduct of the case . . . particularly if the lower court's decision is patently incorrect and the interlocutory decision . . . will have immediate consequences for the petitioner."[4] This case presents such important, clear-cut issues.

First, the willfulness question presented here is one of pure statutory interpretation over which the circuits are divided: What is the proper standard for determining willfulness under § 1681n of FCRA? Is actual knowledge required? Is recklessness sufficient? Or, is something less than recklessness sufficient? No facts are needed to answer these questions. Indeed, this Court is not being asked to review (nor would it be interested in) erroneous factual findings or the misapplication of a properly stated rule of law.[5] And while Respondents suggest that review at this time would somehow fail to give proper guidance to lower courts, this Court has previously granted certiorari to determine the meaning of the word "willfully" in another statute, where much less was at stake, in a case in the same procedural posture as this one. In *McLaughlin v. Richland Shoe Co.*,[6] the Third Circuit had determined the meaning of the word "willfully" as used in the Fair Labor Standards Act ("FLSA"), had vacated the district court's summary judgment, and had remanded the case for consideration under the Third-Circuit's newly defined willfulness standard.[7] The petitioner filed a petition for a writ of certiorari, asking this Court to resolve a conflict among the

4. Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 259 (8th ed. 2002); *see also Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 166-70 (1994) (granting review despite the interlocutory status of the case to "resolve the continuing confusion"); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) ("Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.'"); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945) (granting certiorari despite the interlocutory status of the case because the issue was "fundamental to the further conduct of the case").

5. *See* Sup. Ct. R. 10.

6. 486 U.S. 128 (1988).

7. *Id.* at 130-31.

circuits concerning the proper standard for determining willfulness, which this Court granted.[8] Eighteen years later, despite the procedural status of the case when certiorari was granted, the Court's opinion in *Richland Shoe* has now been cited as authority in over 600 decisions by courts all across the country. Thus, as in *Richland Shoe*, review in this case at this time would resolve the circuit split and would most certainly give guidance to the courts below and to courts all across the country.

Second, the willfulness question is fundamental to the further conduct of this case. For example, GEICO has argued that, because the district court interpreted FCRA precisely as GEICO did, GEICO's interpretations and conduct were objectively reasonable and could not have constituted a willful violation of the statute.[9] If this Court grants certiorari and agrees, then this case will be over. In other words, the willfulness issue is so fundamental to the further conduct of this case that it may even be dispositive. Review at this time would hasten or finally resolve this litigation.[10]

And finally, the Ninth Circuit's erroneous willfulness standard has immediate, irreparable consequences for GEICO and other parties in numerous other cases. Because of the Ninth Circuit's holding that a company willfully violates FCRA unless it (1) has "diligently and in good faith" attempted to determine its obligations and (2) "has thereby come" to a "reasonable," "plausible" (which means reasonable), non-"creative," and "tenable" interpretation of FCRA,[11] the burden of proof in the district court has arguably been shifted from Edo (to prove willfulness) to GEICO (to prove non-willfulness). Indeed, because of the Ninth Circuit's erroneous standard, GEICO has effectively been required to assert an

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8. *Id.* at 131.

9. GEICO's Pet. for a Writ of Cert. 24.

10. *See Erns. & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (granting certiorari even though the Seventh Circuit reversed and remanded the district court's entry of summary judgment).

11. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006). (App. at 34a.)

advice-of-counsel defense in the district court to prove that any alleged violation was not, in fact, willful.[12] GEICO has moved the district court to stay any obligation it may have to produce privileged documents in support of such a defense until this Court acts on GEICO's Petition for a Writ of Certiorari. But if GEICO's petition is denied, GEICO will most certainly be forced to produce privileged documents, which, but for the Ninth Circuit's erroneous willfulness standard, GEICO would not have been required to produce. Thus, the Ninth Circuit's interlocutory decision has immediate, irreparable consequences for GEICO.

2. Respondents' announcement that other cases have settled further demonstrates why review is necessary at this time.

Several times in Respondents' Brief in Opposition, Respondents announce that the Petitioner in Docket No. 06-82, Hartford Fire Insurance Company, recently agreed to settle, and that another insurance company, Nationwide Insurance Company, recently agreed to settle for $280 per class member.[13] Respondents argue that the Court should deny GEICO's petition because—they claim—this case might be resolved by settlement.[14]

But like Edo's decision to drop his punitive-damages claim on the same day that Respondents' Brief in Opposition was filed, these recent settlements actually further demonstrate why review should be granted at this time: The Ninth Circuit's willfulness standard for statutory and, yes, punitive damages is so low and so unpredictable that companies are being forced to settle cases to avoid FCRA's potential for what Justice Kennedy has called "crushing liability."[15] Indeed, even without a punitive-damages claim, FCRA allows for the recovery of statutory damages between $100 and $1,000 per class member, and FCRA has no aggregate-damages cap.[16] Thus, because of

12. GEICO's Pet. for a Writ of Cert. 18.

13. Respondents' Br. in Opp'n 7.

14. Respondents' Br. in Opp'n 10.

15. *See Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting) (discussing FCRA's statutory damages of between $100 and $1,000).

16. 15 U.S.C. § 1681n(a)(1)(A) (2000).

the Ninth Circuit's vast expansion of FCRA liability, companies that acted in good faith, attempted to interpret issues of first impression, and tried to comply with FCRA are being forced to settle and pay large sums of money to class members with no actual damages, in order to avoid the potential for catastrophic liability.

Respondents argue that the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") amended FCRA and eliminated all private rights of action under § 1681n for § 1681m violations.[17] They essentially argue that this Court should deny certiorari because Congress, through FACTA, put a stop to cases like this one that seek ruinous amounts of statutory damages for unknown and unintended alleged violations of § 1681m. Respondents fail to mention, however, that *FACTA only eliminated private rights of action for § 1681m violations.* Section 1681n, which allows a plaintiff or a class of plaintiffs to recover statutory and punitive damages, applies to numerous other violations of FCRA, not just § 1681m violations. Thus, the enactment did not lessen the need for review of the Ninth Circuit's opinion.

B. The circuit split is real, and Respondents offer no credible argument to the contrary.

1. Even the Ninth Circuit acknowledged the circuit split.

Respondents argue that there is no circuit split regarding the standard for determining willfulness because only one statutory *subsection* is at issue in this case, § 1681n(a)(1)(A), and the cases cited by GEICO purportedly involve other statutory *subsections* within § 1681n.[18] But what Respondents fail to recognize or point out is that the word "willfully" appears *one time* in § 1681n, and it is the governing standard for *all* of § 1681n(a)'s subsections, including § 1681n(a)(2), which allows for the recovery of punitive damages.[19] The term "willfully" does *not* appear separately in § 1681n(a)(1)(A), separately in § 1681n(a)(1)(B), and separately in § 1681n(a)(2). Again, it appears one time. Thus, the apparent basis for

17. Respondents' Br. in Opp'n 2-3, 25-27.

18. Respondents' Br. in Opp'n 2, 15.

19. 15 U.S.C. § 1681n (2000). (App. at 53a-54a.)

Respondents' argument that there is no circuit split is fundamentally flawed.[20]

Even the Ninth Circuit acknowledged the circuit split. In its opinion, the Ninth Circuit expressly recognized a circuit split, purported to adopt the Third Circuit's knowing-or-reckless-disregard standard, and specifically rejected the Sixth and Eighth Circuits' actual-knowledge standard.[21] Every circuit identified in GEICO's petition evaluated the *same term* ("willfully") in the *same statute* (§ 1681n) that is at issue in GEICO's petition:

- Third Circuit—"[The plaintiff] also claims that she is entitled to punitive damages pursuant to 15 U.S.C. § 1681n because [the defendant's] alleged noncompliance . . . was willful."[22]
- Fourth Circuit—"FCRA imposes liability for negligent noncompliance with the Act, and it allows for enhanced penalties for willful violations. *See* 15 U.S.C. §§ 1681n, 1681o."[23]
- Fifth Circuit—"Section 1681n authorizes the court to award actual damages, punitive damages, and reasonable attorney's fees when the [defendant] has willfully failed to comply with any of FCRA's requirements."[24]
- Sixth Circuit—"[T]he language of § 1681n . . . imposes liability for 'willful noncompliance' with the FCRA."[25]

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20. To the extent that Edo argues that the word "willfully" has different meanings depending on the statutory subsection at issue, this argument is also fundamentally flawed. Indeed, under basic principles of statutory construction, the word "willfully" cannot mean "reckless" with regard to subsection (a)(1)(A), "knowing" with regard to subsection (a)(1)(B), and something else with regard to subsection (a)(2). *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (stating that, when a single formulation is called into play with regard to related provisions, there is "even stronger cause" to construe that formulation "the same way each time it is called into play").

21. *Reynolds*, 435 F.3d at 1098 & n.17. (App. at 31a, 32a n.17.)

22. *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997).

23. *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 417 (4th Cir. 2001).

24. *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993).

25. *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998).

- Seventh Circuit—"We are left with [the plaintiff's] argument that she is entitled to 'statutory and punitive damages' because [the defendant] 'willfully failed to comply with' the FCRA. 15 U.S.C. § 1681n."[26]
- Eighth Circuit—"We do not believe that . . . recklessness is equivalent to willfulness under section 1681n."[27]
- Ninth Circuit—"We must first define 'willfully' as it appears in FCRA."[28]

This case squarely presents this Court with the opportunity to resolve the deep division among the circuits on an important and recurring issue.

2. Respondents ignore the crux of the willfulness question presented.

Realizing that they have no response to GEICO's argument that the Ninth Circuit's willfulness standard is inconsistent with this Court's holding in *McLaughlin v. Richland Shoe Co.*,[29] Respondents attempt to reframe the willfulness question in a manner more hospitable to their argument that certiorari should be denied. Specifically, Respondents argue that GEICO asks the Court to review a purported failure by the Ninth Circuit to recognize an advice-of-counsel defense.[30]

But nowhere in GEICO's petition does GEICO argue that the Ninth Circuit failed to recognize an advice-of-counsel defense. Instead, GEICO challenges the Ninth Circuit's standard for determining willfulness in part because it (a) aggravates a pre-existing circuit split; (b) sets a lower legal standard than any other circuit; (c) impermissibly permits a finding of willfulness to be based on nothing more than negligence, gross negligence, or a completely good faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law; (d) improperly shifts the burden of proof; (e) is not practical; and (f) should, but

26. *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005).

27. *Phillips v. Grendahl*, 312 F.3d 357, 369 (8th Cir. 2002).

28. *Reynolds*, 435 F.3d at 1097. (App. at 30a.)

29. 486 U.S. 128, 134-35 (1988).

30. *See* Respondents' Br. in Opp'n 1, 20-25.

does not, require actual knowledge.[31] Respondents miss the point and, in so doing, wholly ignore most if not all of GEICO's arguments that call into question the Ninth Circuit's willfulness standard.

C. Even without punitive damages, application of the Ninth Circuit's erroneous willfulness standard still subjects a defendant to the potential for "crushing liability."

In its petition, GEICO argued in part that the Ninth Circuit's willfulness standard sets too low a threshold for punitive damages because it allows a company that acted in good faith to be found willful and punished with punitive damages merely because the company arrived at an incorrect interpretation of the law.[32] In support of GEICO's petition, several amici curiae similarly argued that punitive damages serve the same purposes as criminal penalties, that the Ninth Circuit's willfulness standard sets too low a threshold for the recovery of punitive damages (and aggregated statutory damages), and that businesses will be subjected to punitive damages even without having known that their actions violated FCRA.[33]

Respondents suggest to this Court that GEICO has "create[d] the mistaken impression" that this is an action for punitive damages,[34] and state, yet again: "Respondents repeat here that they are not seeking punitive damages. Respondents only seek the statutory damages (between $100 and $1,000) . . . ."[35] What Respondents fail to recognize is that, although Edo may have dropped his punitive-damages claim from this case, the potential liability in a case like this one is staggering – even without punitive damages – because FCRA does not impose an aggregate cap on the total statutory damages

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31. GEICO's Pet. for a Writ of Cert. 13-25.

32. GEICO's Pet. for a Writ of Cert. 18-24.

33. *See, e.g.*, Br. of the Chamber of Commerce of the U.S. of Am. & the Bus. Roundtable as *Amici Curiae* in Supp. of Petitioners 16-17; Br. of Prop. Cas. Insurers Ass'n of Am. as *Amicus Curiae* in Supp. of Petitioners 14; Br. for the Fin. Servs. Roundtable as *Amicus Curiae* in Supp. of Petitioners 16.

34. Respondents' Br. in Opp'n 7.

35. Respondents' Br. in Opp'n 7, 17.

available in class-action litigation.[36] In other words, while punitive damages are no longer part of this case, the Ninth Circuit's erroneous willfulness standard will still be applied to determine whether potentially massive statutory damages are available. Furthermore, when Edo filed his "Notice of Withdrawal of Punitive Damages Claim," doing so most certainly did not erase the availability of punitive damages from § 1681n(a)(2). For every other case brought pursuant to § 1681n, the *same* erroneous willfulness standard, unless set aside, will also be used to determine whether punitive damages are available.

D. GEICO presented two questions for review, not one.

GEICO presented *two* questions for review in its Petition for a Writ of Certiorari, one involving the Ninth Circuit's construction of "willfully" under § 1681n of FCRA, and the other involving the Ninth Circuit's construction of "adverse action" under § 1681m of FCRA. Respondents devoted 99% of their response to the first question, and roughly one paragraph of their response to the second.[37] In fact, Respondents used a good portion of their response to argue that it would be premature to review the willfulness question, but they did *not* argue that it would be premature for this Court to review the adverse-action question. And while the Ninth Circuit's erroneous standard for determining willfulness under § 1681n is very important and has drawn more national attention, the Ninth Circuit's holding that an adverse action has occurred and that notice is required under § 1681m of the Act, even when a consumer's credit information has had no adverse impact on the rates or terms provided, is just as flawed, just as important, and just as ripe for review. Indeed, like the willfulness question, the answer to the adverse-action question, by itself, may completely dispose of this entire case.

III. Conclusion

GEICO's Petition for a Writ of Certiorari should be granted.

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36. *See Trans Union*, 536 U.S. at 917 (Kennedy, J., dissenting) (discussing FCRA's statutory damages of between $100 and $1,000, and noting the potential for "crushing liability").

37. Respondents' Br. in Opp'n 29-30.

Respectfully submitted,

ROBERT D. ALLEN*
MELONEY CARGIL PERRY
JAY F. UTLEY
BRANDON P. LONG
BAKER & MCKENZIE LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 978-3000

Attorneys for Petitioners

* *Counsel of Record*

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IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY, *Petitioner*,

v.

JASON JAY REYNOLDS, *Respondent*.

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*, *Petitioners*,

v.

CHARLES BURR, *et al.*, *Respondents*.

(captions continued on inside cover)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN INSURANCE ASSOCIATION AND THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONERS

J. STEPHEN ZIELEZIENSKI
ALLAN J. STEIN
DAVID F. SNYDER
CATHERINE I. PAOLINO
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., NW
Suite 1000
Washington, DC 20036
(202) 828-7100

SETH P. WAXMAN
Counsel of Record
NOAH A. LEVINE
DAVID A. O'NEIL
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

GEICO GENERAL INSURANCE COMPANY, *et al.*, *Petitioners*,

v.

AJENE EDO, *Respondent.*

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Petitioners*,

v.

JULIE WILLES, *Respondent.*

CHRISTIAN JOHN RATAJ
NATIONAL ASSOCIATION OF MUTUAL
INSURANCE COMPANIES
6707 Flagler Road
Fort Collins, CO 80525
(970) 204-6695

QUESTION PRESENTED

Whether the Ninth Circuit erred in holding, contrary to the decisions of at least seven other circuits, that a defendant may be found to have "willfully" violated the Fair Credit Reporting Act even if it did not have actual knowledge that its conduct violated the FCRA.

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INTEREST OF AMICI CURIAE[1]

The American Insurance Association (AIA) and the National Association of Mutual Insurance Companies (NAMIC) are national trade associations representing companies writing property and casualty insurance in every state and jurisdiction of the United States. Collectively, AIA and NAMIC members underwrite over $300 billion in premiums each year and provide coverage in a broad range of personal and commercial lines of business. Both amici regularly appear in judicial proceedings to inform courts about the implications of legal developments for their members. Both participated below as amici in support of Petitioners.

Review of the Ninth Circuit's interpretation of the Fair Credit Reporting Act (FCRA) is extremely important to both AIA and NAMIC. The Ninth Circuit's construction of the decades-old statute as imposing requirements on insurance companies that no court previously has recognized, and its indication that defendants might be found liable for "willfully" violating these unprecedented requirements, despite their good-faith compliance efforts, threaten members of the insurance industry with substantial and severe liability.

STATEMENT

In the 1990s, many insurers began using credit-based insurance scores—scores derived from credit report information—in underwriting and pricing personal lines of insurance. The use of such scores enables insurers to rate insurance risks more accurately and, thus, to avoid subsidization by some consumers of the higher risks presented by other consumers. The more accurate classification of risk trans-

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part. No person or entity, other than amici and their members, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

lates into lower premiums for many consumers and increased availability of coverage.

The FCRA requires the entity that "takes any adverse action" to issue an adverse-action notice. 15 U.S.C. § 1681m(a). Each insurance company using insurance scores made a determination of what triggered its FCRA duty to provide adverse-action notices. Separate determinations made by different insurers, often on advice of counsel, resulted in various practices. Given the absence of any court decisions interpreting the FCRA's insurance adverse-action definition—15 U.S.C. § 1681a(k)(1)(B)(i)—or any binding agency regulations, insurers conformed their practices to their good-faith interpretations of the FCRA's text and any applicable state-law requirements.

Many insurers reasonably determined that the FCRA did not require adverse-action notices upon the setting of an initial charge for insurance and, accordingly, for a number of years, did not provide notices in such circumstances. Even among those insurers that did provide notices in such "initial charge" circumstances, many did not do so in the broad "best rate" circumstances apparently now required by the court of appeals. Instead, rationally, many insurers attempted to determine when their use of insurance scores—compared to not using such scores—would adversely affect the consumer and issued adverse-action notices in those circumstances. To notify a consumer that she had been adversely affected when in fact she was helped by the use of her insurance score—even if the consumer might have been helped more had her insurance score been better—would have contradicted common sense.

Many insurance-company groups operate in an economically efficient, integrated fashion, in which a separate and distinct corporate entity provides centralized insurance, financial, technological, and management services to affiliated issuing insurers through written agreements. Often, this separate corporate entity orders consumers' insurance scores and applies previously established rating criteria to determine an appropriate premium. Sometimes, a con-

sumer's rate is affected by the placement of the consumer with one of several insurer affiliates within an integrated company group (where the affiliates offer different rating levels). Amici know of no company that believed, prior to the Ninth Circuit's decision, that entities other than the affiliated insurer who issued the relevant policy (or was responsible for denying coverage for the integrated company group altogether) must issue adverse-action notices.

In 2001 and 2002, a group of consumers initiated eight putative nationwide class actions in federal district court, alleging that Petitioners' and other insurers' adverse-action notice practices contravened the FCRA's requirements.[2] The complainants did not allege that they had suffered any actual damages, which a plaintiff must show to recover for a "negligent" violation of the FCRA. 15 U.S.C. § 1681o. Instead, the complainants sought an extraordinary remedy of statutory and punitive damages under § 1681n, which states that "[a]ny person who *willfully* fails to comply with any requirement imposed under [the Act] with respect to any consumer is liable to that consumer" for statutory damages of $100 to $1000 per violation, punitive damages, and attorneys fees. 15 U.S.C. § 1681n(a) (emphasis added).

The district court, addressing questions of national first impression, concluded in one of the cases that only the insurance affiliate to whom a consumer applies can "take" an adverse action and therefore incur an obligation to issue a notice. *Willes* v. *State Farm Fire & Cas. Co.*, CV 01-1457-BR, State Farm Pet. App. 74a-75a. In another case, the district court also held that an "adverse action" does not occur when

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[2] *Ashby* v. *FICO*, CV 01-1446-BR (filed Sept. 28, 2001); *Willes* v. *State Farm Fire & Casualty*, CV 01-1457-BR (filed Oct. 1, 2001); *Spano* v. *Safeco Ins. Co. of Or.*, CV 01-1464-BR (filed Oct. 2, 2001); *Dikeman* v. *Progressive Corp.*, CV 01-01465-BR (filed Oct. 2, 2001); *Razilov* v. *AMCO Ins. Co.*, CV 01-1466-BR (filed Oct. 3, 2001); *Rausch* v. *Hartford Fin. Servs. Group*, CV 01-1529-BR (filed Oct. 16, 2001); *Mark* v. *Valley Ins. Co.*, No. CV-01-1575-BR (filed Oct. 24, 2001); *Edo* v. *GEICO Cas. Co.*, CV 02-678-BR (filed May 24, 2002).

an insurer, on the basis of information in a consumer's credit report, charges the consumer an initial rate that is higher than the best available rate. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1318-1319 (D. Or. 2003). Based on the same reasoning, and on appropriate motions, the district court granted summary judgment to all Petitioners in these cases. At the time they were issued, the district court's decisions on these questions were the first and only reported opinions addressing the application of the FCRA's "adverse-action" notice requirement in this insurance context. *See id; Spano* v. *SAFECO Ins. Co.*, 215 F.R.D. 601 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977 (D. Or. 2003).

Plaintiffs in the four cases at bar appealed the adverse summary judgment rulings to the Ninth Circuit. In an opinion issued on August 4, 2005, in the consolidated *Reynolds* and *Edo* cases, a divided panel reversed the district court on each of the FCRA issues described above.[3] In particular, the Ninth Circuit held that an adverse action occurs when an insurer charges an initial rate that is higher than the consumer would have been offered if he had a better credit score, and that any insurance entity with any relation to the scoring of the consumer or a rate decision for that consumer is obligated to send an adverse-action notice. Pet. App. 48a-54a, 57a-60a.[4]

The Ninth Circuit also rejected Petitioners' arguments that they were entitled to summary judgment in any event because any alleged noncompliance was not "willfu[l]" under § 1681n. Pet. App. 65a-66a. The court concluded that the

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[3] The Court resolved the appeals of Petitioners State Farm and Safeco in unpublished dispositions issued the same day and relied therein on the decision in the consolidated *Reynolds* and *Edo* cases. This brief uses the term "decision below" to refer to the Ninth Circuit's last decision under the consolidated *Reynolds* and *Edo* caption. *See infra* 5-6.

[4] In this brief, citations to the "Pet. App." are to the Appendix to the Petition for Safeco Insurance Company unless otherwise indicated.

"willfulness" standard encompasses not only "conscious disregard" of known legal obligations, but also "recklessness." *Id.* at 62a. In addition, the court reasoned, a defendant may act "recklessly" if it adopts "unreasonable answers to issues of first impression" under the FCRA. *Id.* at 64a. Two members of the panel then went further, concluding (apparently as a matter of law) that Petitioners' interpretations were so "objectively unmeritorious" that they were reckless and thus willful. *Id.* at 64a-65a. The panel majority did not explain how its conclusion could possibly be consistent with the fact that the district court—another Article III tribunal—had concluded that the FCRA "unambiguous[ly] and plainly" supported Petitioners' construction of the statute. *Mark*, 275 F. Supp. 2d at 1318. Judge Bybee dissented, explaining that he "would not decide, as a matter of fact or law, that the insurance companies acted willfully" without further examination of that question. Pet. App. 67a-68a.

Joined by several amici, including the AIA and NAMIC, Petitioners sought rehearing en banc, noting that the Ninth Circuit's holding that adherence to an "unreasonable" legal interpretation may constitute willful noncompliance directly contradicted decisions of this Court. *See, e.g.*, Br. for Amici Curiae AIA and NAMIC in Support of Pet. for Reh'g En Banc 5-6 (citing *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (rejecting the proposition that "a finding of unreasonableness [would] suffice as proof of" willfulness); *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 616 (1993)). In response, the Ninth Circuit issued an amended opinion that reached the same result but removed the words "reasonable" and "unreasonable," replacing them with synonyms such as "tenable," "indefensible," and "implausible." Pet. App. 69a-99a. Judge Bybee again dissented. *Id.* at 99a-101a.

Petitioners once more sought rehearing en banc, and the Ninth Circuit issued another amended opinion. This time, however, the court responded to the petitions by retreating from its *sua sponte* finding of Petitioners' alleged willful noncompliance, instead remanding to the district court to decide whether Petitioners had "willfully" violated the

FCRA. *Id.* at 129a. The court appeared to set forth a two-step framework for addressing that question under its "reckless disregard" standard: First, a court should determine whether a defendant adopted an interpretation of the FCRA that the court (in hindsight) finds "implausible." *Id.* If so, the court must then examine the "obviousness or unreasonableness of the erroneous interpretation" and, "[i]n some cases," "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* The court noted that it found "some" of Petitioners' FCRA interpretations "implausible," without further specification, thus requiring the additional "recklessness" inquiry on remand. *Id.* The Ninth Circuit did not, however, specify how a district court is to apply or otherwise use the "unreasonableness" or "company decision" factors, what weight should be accorded each, or when examination of the second is appropriate.

SUMMARY OF ARGUMENT

Amici agree with Petitioners that the decision below implicates a clear and entrenched circuit split on the meaning of the term "willfully" in 15 U.S.C. § 1681n, and that the Ninth Circuit adopted an erroneous interpretation of that term. Amici urge this Court to resolve that split now, in the context of these cases, for two reasons.

First, the Ninth Circuit's incorrect construction of the term "willfully" will require costly, intrusive, and needless litigation under a standard likely to breed significant confusion in the district court. Had the Ninth Circuit interpreted § 1681n correctly, Petitioners should have been entitled to judgment as a matter of law on the ground that they did not "conscious[ly] disregard" any known legal obligations under the FCRA. The positions Petitioners had followed and defended in the district court and Ninth Circuit were not only eminently reasonable, they were in fact more faithful to statutory text and structure than those the Ninth Circuit adopted. The only court previously to address those positions—the district court—not only had *agreed* with Petitioners' interpretations of the FCRA, but in fact had concluded

that the statutory text "reasonably cannot be read" to support the construction that the *Ninth Circuit* later adopted. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003). The Ninth Circuit's novel construction of the FCRA's adverse-action notice requirement was neither known nor established prior to the decision in these cases. Petitioners' failure to comply with that unlikely construction thus could not constitute "conscious disregard" of known legal obligations under the FCRA.

Second, the Ninth Circuit's erroneous construction of § 1681n threatens substantial harm to the insurance industry. If allowed to stand, the decisions below will permit the imposition of staggering liability, with necessarily severe consequences for insurers and consumers alike. Moreover, because questions of first impression regarding the FCRA may frequently arise in other insurance contexts, insurers will face the threat of costly class-action litigation and substantial liability for any interpretation of the Act that a court later deems "implausible." The Ninth Circuit's erroneous interpretation will similarly bind the many other businesses that routinely make use of consumer credit information. This Court's review is critical to protecting personal-lines insurers and other businesses from substantial damages that Congress never intended to impose.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER COURTS OF APPEALS AND IS ERRONEOUS

Amici agree with Petitioners that there is a clear and well-developed split among the circuit courts on the important question of the meaning of the term "willfully" in 15 U.S.C. § 1681n. As Petitioners explain, the Ninth Circuit's decision conflicts with the holdings of at least seven other circuits, which have concluded that a defendant "willfully" violates the FCRA only if it "knowingly and intentionally committed an act in conscious disregard for the rights of the consumer." *Ausherman* v. *Bank of Am. Corp.*, 352 F.3d 896,

900 (4th Cir. 2003); *see Wantz* v. *Experian Inf. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357, 368 (8th Cir. 2002); *Cousin* v. *Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Casella* v. *Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995); *Zamora* v. *Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (per curiam); Hartford Fire Pet. 11-15; Safeco Pet. 14-19; GEICO Pet. 10-13; State Farm Pet. 21-23. Amici also agree with Petitioners that the Ninth Circuit's interpretation of "willfully" is erroneous, because it conflicts with the FCRA's text, structure, and history, and because the Ninth Circuit's reasoning is inconsistent with decisions of this Court. *See* Pet. for Hartford Fire, at 15-20; Pet. for Safeco, at 19-23; Pet. for GEICO, at 13-24; Pet. for State Farm, at 23-30.

Petitioners comprehensively and persuasively brief these issues, and amici will not repeat those arguments here. Instead, amici submit this brief to explain why the Court should resolve the circuit split at this time and in these cases. Review is necessary now for two principal reasons. First, the Ninth Circuit's decision will require Petitioners to engage in wholly unnecessary and costly litigation in these cases under an ill-defined, standardless, and intrusive framework governing the "recklessness" inquiry. Second, the decision below threatens grave injury to the insurance industry as a whole, permitting substantial statutory damage awards in FCRA adverse-action litigation and encouraging the filing of class-action suits seeking massive damages for blameless conduct in this and other FCRA contexts.

A. The Ninth Circuit's Erroneous Decision Requires Wholly Unnecessary And Costly Litigation Under A "Willfulness" Standard That Lacks Any Definite Content

The Ninth Circuit remanded these cases based on its finding that "some" of Petitioners' interpretations of the FCRA were "implausible." Pet. App. 129a. In the Ninth Circuit's view, its hindsight observation of supposed "implausibility" triggered the need for a remand so that the dis-

trict court could now undertake an additional and searching inquiry to determine whether certain of the defendant's failures to comply with the FCRA were "reckless," thereby giving rise to statutory and punitive damages. *Id.* The Ninth Circuit explained that this "recklessness" inquiry involves at least two factors—the "unreasonableness" of the defendant's interpretation of the FCRA, and a factual inquiry into the manner in which the defendant's decision makers reached the supposedly "implausible" interpretations, based on "the testimony of the company's executives *and counsel*." *Id.* (emphasis added).

The Ninth Circuit failed to clarify the content or purpose of any step in this analysis. It did not, for example, explain what constitutes an "implausible" interpretation beyond its bare assertion that "at least some" of Petitioners' positions satisfied that standard, without further specification. The Ninth Circuit provided no guidance about how courts are to identify those interpretations that are sufficiently "implausible" to warrant further "recklessness" scrutiny but not so "unreasonable" as to justify a finding of "recklessness." And the court failed to direct what weight either of the two factors should carry or what is unique about "some cases" that requires an examination of the internal communications between an insurer and its counsel. The Ninth Circuit's decision thus breeds confusion and, until it is reversed, will require district courts confronted with class actions seeking massive statutory damages under the FCRA to apply a "recklessness" framework that defies concrete application.

B. Under The Correct Standard, All Petitioners Should Have Been Entitled To Judgment As A Matter Of Law

The standardless litigation to which the Ninth Circuit has subjected the parties and the district court is not justified. Under the correct interpretation of the term "willfully" in § 1681n, adopted by at least seven courts of appeals, the only question the court should have addressed in these cases was whether the defendants exhibited "conscious disregard"

of known legal obligations. *See supra* pp. 7-8 (citing cases adopting this standard). The answer to that question here was plainly no. The positions Petitioners adopted regarding the FCRA's adverse-action notice requirement were not only eminently reasonable, they were in fact compliant with the FCRA. The district court concluded, in the first published opinions addressing these questions, that the FCRA "unambiguous[ly] and plainly" supported Petitioners' interpretations. *Mark*, 275 F. Supp. 2d at 1318. And in any event, where, as here, "[t]here was no prior guidance to suggest that" defendants' practices were "insufficient" under the FCRA, the court "[could] not conclude that [the defendants] knowingly and intentionally" violated the FCRA "in conscious disregard of consumers' rights." *Stevenson* v. *TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993). A closer examination of the actual FCRA statutory violations that the Ninth Circuit believes Petitioners may have "recklessly" committed demonstrates the magnitude of the court's error in these cases.

1. An "Adverse Action" Does Not Occur Whenever An Insurer Charges A Customer More Than The Insurer's Best Rate, Or When An Insurer Establishes An Initial Insurance Charge

The FCRA defines an "adverse action" in the insurance context to mean:

> a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

§ 1681a(k)(1)(B)(i). The Ninth Circuit held that the establishment of an initial charge is covered by the statutory phrase "'increase in any charge' . . . for insurance." Pet. App. 114a. In particular, the Ninth Circuit concluded that an insurer "increase[s]" a "charge" for insurance, based on a credit report, when the insurer "charg[es] a higher price for initial insurance than the insured would otherwise have been

charged because of information in a consumer credit report." *Id.* at 114a.

As Petitioners argued below, that reading runs contrary to the plain meaning of the statutory text. The Ninth Circuit recognized that "'[i]ncrease' means to make something greater." *Id.* Yet one cannot make "something" greater if that "something"—here a charge to the consumer—does not yet exist. This is not only the natural use of "increase," but also the way numerous courts, including the Ninth Circuit itself, have used the term.[5]

The Ninth Circuit rejected this customary meaning of "increase" based on a phrase found later in the "adverse action" definition: "any insurance, existing or applied for." The court assumed that Congress intended each of the various actions described in § 1681a(k)(1)(B)(i)—*e.g.*, "denial," "increase"—to modify both "existing" and "applied for" insurance. Pet. App. 115a. But that assumption is erroneous; the court's reading ignores that most of the actions described in § 1681a(k)(1)(B)(i) make sense only when read to modify either "existing" or "applied for" insurance, but not both. For example, "cancellation" naturally modifies only "existing" insurance, as in the cancellation of an existing insurance policy based on information learned from a customer's credit report. One cannot "cancel" something that does not exist. The term "denial," on the other hand, naturally modifies only insurance that a consumer has "applied for," as in the denial of an application for insurance based on information in the applicant's credit report. Thus, insurers could reasonably interpret § 1681a(k)(1)(B)(i) as requiring notices for

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[5] *See Certain Underwriters at Lloyd's* v. *Montford*, 52 F.3d 219, 221 (9th Cir. 1995) ("The insured value ... was initially set at $925,000, and was [later] increased to $1,050,000 ...."); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 558 (1962) (plurality op.); *Bernklau* v. *Principi*, 291 F.3d 795, 798 (Fed. Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1016 (10th Cir. 2002); *United States* v. *Schallom*, 998 F.2d 196, 199 (4th Cir. 1993) (per curiam); *United States* v. *Golden*, 954 F.2d 1413, 1415 (7th Cir. 1992).

- a "denial" of an "appli[cation]" for insurance,
- a "cancellation" of "existing" insurance,
- an "increase in any charge for . . . existing" insurance, or
- "a reduction or other adverse or unfavorable change in the terms of coverage or amount of . . . existing" insurance.

By stretching the term "increase" to modify both "existing" and "applied for" insurance, the Ninth Circuit effectively interpreted "increase" to mean establishing an insurance "charge" that does not yet exist and doing so at a higher level than the "charge" might have been established under different circumstances. That reading, to say the least, strains the normal, straightforward reading of the term. That much is clear from the Ninth Circuit's awkwardly phrased conclusion that the plaintiff's "rate was increased above that which it would have otherwise been because of his credit report." Pet.App. 117a.

But even if the FCRA's definition of "adverse action" did extend to "increase[s]" in "charge[s]" above a hypothetical and nonexistent charge, the Ninth Circuit's "best rate" construction—*i.e.*, that an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *id.* at 118a—is neither obvious nor correct. The court's interpretation does not seek to measure the effect that the use of a credit report has on an insurance charge. For example, in the Ninth Circuit's view, the application of the adverse-action notice requirement does not turn on whether the use of a credit report adversely affects a consumer versus the non-use of that credit report. Rather, the Ninth Circuit decision requires insurers to measure the adverseness of using credit-report information against a hypothetical scenario in which different credit-report information is used. Nothing in the statute suggests that construction, nor did the court attempt to ground its holding in any statutory text. Rather, the court appeared to impose the requirement as a matter of mere policy. *See id.*

The Ninth Circuit's interpretation flies in the face of common sense. In that court's view, the FCRA would require insurers to notify a consumer that she was adversely affected by the use of her credit report even if that use in fact yielded a *better* rate than had her credit report not been used at all.

Recent congressional action supports the view that both the "initial charge" and "best rate" constructions in the decisions below are erroneous. In 2003, Congress amended the FCRA to require creditors (but not insurers) to provide a separate "risk-based-pricing" notice to a consumer when the use of credit-report information results in an offer with "material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers." Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 311(a), 117 Stat. 1952, 1988 (codified at 15 U.S.C. § 1681m(h)(1)). This new provision expressly applies to initial offers and specifies a baseline (not "best rate") against which a creditor must measure the effect that use of credit-report information had. Congress thus knew how to link an FCRA notice requirement to the setting of an initial rate that is not as favorable as another baseline rate. That the FCRA's insurance-specific, adverse-action definition lacks similarly plain language confirms the error of the Ninth Circuit's decision. Indeed, the court's construction would hold insurers to a higher standard than lenders, even though the only clear FCRA textual requirement for the provision of notices in this context is the risk-based pricing provision for creditors added by the 2003 FCRA amendments.

2. An Insurance Affiliate That Neither Issues An Insurance Policy To A Person Nor Denies That Person Insurance Coverage Does Not "Take" An "Adverse Action" Against That Person

As Petitioners argued below, only the entity that issues the relevant insurance policy (and thus, for example,

"charge[s]" a customer for insurance or "cancel[s]" that insurance) or the entity that "deni[es]" insurance coverage "takes" one of the "adverse actions" specified in § 1681a(k)(1)(B)(i). Only that entity is therefore required under the FCRA to send the consumer an "adverse action" notice. The Ninth Circuit erred in exposing additional insurer affiliates to liability if they do not send their own additional notices to the consumer or list themselves in the original notice. The court cast this unjustifiably wide net of liability by holding that any entity with any theoretical connection to an insurance rating decision "takes" an "adverse action" within the meaning of § 1681m(a), and therefore may be held liable when a consumer is not provided an adverse-action notice.

The Ninth Circuit's conclusion was based primarily on an incorrect piecing together of multiple statutory sections. The court emphasized two phrases: "any person" in § 1681m(a), and "in connection with the underwriting of insurance" in § 1681a(k)(1)(B)(i). The Ninth Circuit apparently believed that these phrases, if read together, reveal congressional intent to require any person with any theoretical connection to the purported adverse action to issue an adverse-action notice. *See* Pet. App. 122a. The terms are found in different statutory provisions, however, and there is no indication that Congress intended the meaning the Ninth Circuit adopted.

The court also purported to ground its construction in the FCRA's purposes, but its holding runs counter to those purposes. As the Ninth Circuit noted, adverse-action notices are intended to provide consumers "important information about the benefits of improving their credit rating." Pet. App. 116a. That information is conveyed by any single entity providing an adverse-action notice, thereby informing the consumer that her credit information contributed to an adverse action. Requiring every insurance entity with any theoretical connection to the purported adverse action to issue such a notice, or requiring every such entity to be listed in a single notice, does nothing to enhance the con-

sumer's understanding. In fact, such a requirement is likely only to confuse. Under the decisions below, consumers must receive notices from numerous insurance entities (or notices listing numerous such entities) with whom the consumer has never had any interaction.

C. The Ninth Circuit's Refusal To Grant Judgment As A Matter Of Law On The Question Of Willfulness Illustrates The Serious Error In That Court's Approach

Petitioners' constructions of the FCRA adverse-action requirement were compliant with the Act and, at a minimum, were far from unreasonable. The Ninth Circuit's contrary construction of that requirement was for this reason far from preordained. For purposes of the proper "willfulness" inquiry, the rules imposed under the court's novel interpretation of the FCRA could hardly be termed known legal obligations. Accordingly, had the Ninth Circuit applied the proper legal standard when considering respondents' allegations of "willful" noncompliance, only one judgment could have been rendered. Petitioners did not knowingly and intentionally disregard any known legal obligation under the FCRA. The Ninth Circuit's remand for a costly inquiry into petitioners alleged "recklessness" should never have been ordered.

The decision below thus compellingly illustrates the serious error in the Ninth Circuit's interpretation of § 1681n. At base, the Ninth Circuit held Petitioners to have "willfully" violated the FCRA simply because the court disagreed with Petitioners' answers to questions of first impression regarding ambiguous and complex statutory provisions. The court labeled "some of" Petitioners' positions "implausible" even though the agency charged with enforcing the FCRA's requirements had issued no binding interpretation of the relevant provisions and had not for 30 years (and to amici's knowledge, still has not) brought any enforcement action against an insurance company for failing to issue adverse-action notices in these circumstances. And the court reached these conclusions even though another Article

III court had adopted precisely the positions Petitioners advanced—and had further concluded that the statutory text "reasonably cannot be read" to support the *Ninth Circuit's* construction. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d at 1317; *see Spano* v. *Safeco Ins. Co.*, 215 F.R.D. 601, 605-606 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213, 1224-1226 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977, 988-991 (D. Or. 2003).

Although the Ninth Circuit purported merely to construe the FCRA's statutory requirements, the court's reasoning resembles the type of rulemaking that is not properly the province of an Article III court, yet without the notice and opportunity for comment that normally accompanies such process. The court then imposed these requirements *ex post facto* by finding that Petitioners should have obeyed them long before they were ever announced. In doing so, the court relied more on its own policy judgments than on any "intent" reasonably attributable to Congress. A stark example is the Ninth Circuit's holding regarding who "takes" an adverse action. The court based its expansion of the adverse-action requirement to multiple insurance company affiliates based on mere conjecture that consumers probably do not "understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure." Pet. App. 124a. The court then asserted—without reference to statutory text, structure or legislative history—that Congress intended the FCRA to remedy this assumed lack of knowledge "[b]y imposing joint and several liability" on all insurance entities tangentially related to an insurance rating decision. *Id.*; *see id.* ("By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy."). From that speculative recreation of congressional intent, the Ninth Circuit then fashioned from whole cloth new obligations that

no court or agency had ever imposed.[6] And, most remarkably, the court concluded that its interpretations were the *only* "plausible" ones, accordingly holding that any insurer that failed to anticipate them had acted so recklessly that it could be subject to statutory and punitive damages, the sanction reserved for only the most severe and intentional violations of the FCRA.

The Ninth Circuit's authorization of such severe penalties in these circumstances fundamentally distorts the structure of the FCRA. The statute permits actual (compensatory) damages for "negligent" conduct, *i.e.*, when the defendant should have known, in the exercise of due care, that its practices violated the Act. § 1681o. The statute provides for statutory and punitive damages, by contrast, only when the defendant acts "willfully." By construing the term "willfully" to cover conduct that—for reasons amici explain above—does not even qualify as "negligent," the Ninth Circuit turned Congress's intent on its head. *See* Hartford Fire Pet. 16-17.

The interpretation of the term "willfully" adopted by the Ninth Circuit is dangerous for yet another reason. It will in the future require insurers to give the FCRA the broadest possible reading, in all contexts, lest a court later disagree and interpret the Act differently. As Petitioners demonstrate, that result frustrates the very purposes that the FCRA was designed to further. This effect is com-

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[6] Moreover, as Petitioner Hartford Fire argues, Hartford Fire Pet. 23-26, the Ninth Circuit engaged in the same type of unguided "interpretation" in creating rules—without urging by any party or amici, and without the benefit of briefing—respecting the information that must be contained in an adverse-action notice. *See* Pet. App. 121a. The Ninth Circuit relegated the requirements that *Congress* prescribed to a footnote, and supplemented the plain language of the statute with additional requirements that the *court* deemed important. Thus, based on little more than its own conceptions of good policy, the court held that an adverse-action notice must "at a minimum, . . . describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action, and their respective roles." *Id.*

pounded by the Ninth Circuit's creation of an entirely novel standard for adjudicating a party's "willfulness" based on terms like "untenable," "creative," "implausible," and "indefensible." Those words carry no established meaning in other legal contexts, and only the Ninth Circuit knows their intended meaning here. The result is an unknown and unknowable standard that provides regulated parties no useful guidance.

By addressing these cases, this Court can both correct the Ninth Circuit's pernicious construction and resolve the circuit split that the decisions below both highlight and exacerbate.

II. THE NINTH CIRCUIT'S DECISIONS ARE OF SUBSTANTIAL IMPORTANCE TO THE INSURANCE INDUSTRY AS A WHOLE

The issues the Ninth Circuit addressed have substantial importance not just to the parties, but to all of the insurance industry, many members of which interpreted the Act much as Petitioners did. The conclusions in the decision below expose insurers to statutory damages in situations that Congress did not intend, and to punitive damages even when they have sought in good faith to comply with the FCRA, including by seeking counsel's advice. This exposure threatens significant liability, with broad ramifications for the industry's ability to perform its important functions. Amici estimate that since the beginning of 2001, more than 150 million new personal lines insurance policies have been written. Conservatively estimating that adverse-action violations might be found for half of those policies under the Ninth Circuit's incorrect constructions of the Act, the potential liability is staggering—particularly since the FCRA, unlike the Truth In Lending Act, does not impose a cap on the total statutory damages available in class-action litigation. *Compare* 15 U.S.C. § 1681o(a)(1), *with id.* § 1640(a)(2)(B). The damages that the decision below authorizes would have a substantial and real impact on the operations of amici's members. By removing enormous amounts of capital from

the insurance system, such damages would inevitably harm the insurance marketplace.

In addition, the Ninth Circuit's decision has ramifications that extend well beyond the specific FCRA issues addressed below. The Act regulates insurers in several ways. Issues of first impression commonly arise under the FCRA, and as long as the Ninth Circuit's erroneous "willfulness" standard remains the law, insurers will face the prospect of severe class-action liability if a court later decides (in hindsight) that their answers to any unsettled FCRA questions are "implausible." The nature of the FCRA is such that any single interpretation of an FCRA requirement frequently affects millions of transactions yearly. If a court later decides that adherence to such an interpretation was reckless under the Ninth Circuit's new rule, statutory damages of $100 to $1000 might be available for each of those millions of transactions, resulting in potentially enormous liability.

This Court's review is therefore critical to protecting insurers from staggering damages that Congress never intended to impose.

CONCLUSION

For the foregoing reasons, this Court should grant the writs of certiorari and reverse the decisions of the Ninth Circuit.

Respectfully submitted.

J. STEPHEN ZIELEZIENSKI
ALLAN J. STEIN
DAVID F. SNYDER
CATHERINE I. PAOLINO
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., NW
Suite 1000
Washington, DC 20036
(202) 828-7100

CHRISTIAN JOHN RATAJ
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
6707 Flagler Road
Fort Collins, CO 80525
(970) 204-6695

SETH P. WAXMAN
Counsel of Record
NOAH A. LEVINE
DAVID A. O'NEIL
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

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Nos. 06-82, 06-84, 06-100, and 06-101

File Aug. 21, 2006

In The
Supreme Court of the United States

HARTFORD FINANCIAL SERVICES GROUP, INC., *et al.*,

Petitioners,

-vs-

JASON RAY REYNOLDS, *et al.*,

Respondents.

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

-vs-

CHARLES BURR, *et al.*,

Respondents.

[Additional Captions On Inside Cover]

On Petitions For Writs Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MARIA GHAZAL
BUSINESS ROUNDTABLE
1717 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 872-1260

CAMILLE A. OLSON*
GERALD L. MAATMAN
PAUL E. FREEHLING
CHRISTOPHER E. PAETSCH
PAMELA QUIGLEY DEVATA
SEYFARTH SHAW LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000

**Counsel of Record*

Counsel for Amici Curiae

August 21, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Case 06-100

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

Case 06-101

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

JULIE WILLES,

Respondent.

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size, in every industrial sector and from every region of the country.[1] A principal function of the Chamber is to advocate the interests of the business community by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

The Business Roundtable ("Roundtable") is an association of chief executive officers of leading American companies with over $4.5 trillion in annual revenues and more than ten million employees. The Roundtable's member companies comprise nearly one-third of the total value of the United States stock market, and represent nearly one-third of all corporate income taxes paid to the United States government. Collectively, the Roundtable's member companies returned more than $10 billion in dividends to shareholders and the American economy in 2005. The Roundtable is committed to advocating public policies which ensure vigorous economic growth and a productive workforce in America.

The Fair Credit Reporting Act ("FCRA") is a fundamental part of how business is conducted in this country. Nearly every type of commerce involves a party's credit history, for purposes as diverse as determining eligibility for mortgages, personal and business loans and other financial services; verification of educational records for licensing purposes; establishing an account for the purchase and service of telephones and other goods; and to confirm the identity, references and other background information of individuals seeking employment or promotion.

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[1] Pursuant to United States Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber and the Roundtable made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amici* brief, and their consent letters are on file with the Clerk of Court.

For this reason, the questions presented in these cases – namely, the scope of "adverse action" under the statute as it pertains to the sale of insurance, and the threshold of liability for "willful" violations of the FCRA – while of great concern to the nation's insurers, also go far beyond the provision of insurance to individual consumers. If left to stand, the Ninth Circuit's decision would unfairly expose the nation's businesses to liability for "willful" violations of the FCRA even when making a good-faith effort to comply with the statute; needlessly introduce uncertainty into countless transactions; and burden businesses and individuals alike with myriad unclear, even meaningless, notices under the FCRA.

The members of the Chamber and the Roundtable depend upon the procedures of the FCRA to accomplish all of these important purposes, and more. For the members of the Chamber and the Roundtable, it is therefore vital that the FCRA provide clear and consistent guidance as to a business' obligations when that business consults credit reports. And it is likewise important not only for every employer, merchant and service provider in the country – but for every consumer, employee and job applicant as well – that the required communications under the FCRA be understandable and helpful.

Accordingly, the Chamber and the Roundtable support the Petitions for Writs of *Certiorari* in these cases.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The case presents this Court with the opportunity to resolve a well-developed split between the Circuits concerning important, pervasive and recurring questions of federal law. The Ninth Circuit's holdings as to "adverse action" and "willfulness" under the FCRA are erroneous and pose devastating consequences for the daily transaction of business in this country. If left to stand, the Ninth Circuit's decision will needlessly introduce unfairness, uncertainty and confusion to all sectors of the American economy.

The Ninth Circuit's decision departs from both the unambiguous text of the FCRA and the case law established under that statute. Without intervention from this Court, the

Ninth Circuit's decision would dramatically expand the occurrences of "adverse actions" under the statute – rendering the accompanying "adverse action" notices to consumers so frequent and confusing as to be meaningless – and collapse the FCRA's express distinction between "willful" and non-willful violations of its terms.

The Ninth Circuit's Error as to "Adverse Action" under the FCRA

In the context of the sale of insurance, the FCRA expressly defines an "adverse action" as a denial, cancellation, increase in the change for, or change in the terms of coverage. Yet the Ninth Circuit's construction of "adverse action" ignores that statutory definition. Instead, the Ninth Circuit's decision expands the scope of "adverse action" to encompass any occasion in which an insurer consults a consumer's credit report and offers the consumer anything other than the insurer's best possible rate for insurance. That result is not only violative of the language of the statute, it also leads to absurd results.

The Ninth Circuit's definition of "adverse action" is confusing and impractical. No insurer can offer the lowest possible rate for its products to more than a small fraction of its customers (at least not while remaining in business). This fact alone would result in millions of consumers receiving "adverse action" notices for no reason other than that they were not offered the rate received by insurers' best customers. Still more puzzling is that the review of a consumer's credit report often leads the insurer to offer the consumer a better rate than would have been offered if the credit information had not been consulted. And yet, if that rate were anything less than the best available rate, the Ninth Circuit decision would require the insurer to send an "adverse action" notice to the consumer – despite the fact that both the consumer and the insurer were better off because of the use of the information in the credit report.

The impact of the Ninth Circuit's decision is also likely to be felt far beyond the insurance industry. The FCRA uses the same or substantially the same language to define "adverse action" in its provisions relating to other activities, including

the administration of regulatory licenses, eligibility for government benefits, and the use of credit reports for purposes of employment. As a result, the Ninth Circuit's decision can be expected to influence the construction of these related provisions of the statute. This would require the Ninth Circuit's "adverse action" notices to be sent in countless other contexts – including occasions in which an employer's review of a job applicant's credit report led to the offer of a more lucrative position than that in which the applicant was interested, but not the very best job offered to others.

The Ninth Circuit also erred by ignoring the plain language of the FCRA and announcing new components to be included in every "adverse action" notice. The FCRA clearly provides that only two pieces of information must be included in such a notice: (i) the contact information for the credit reporting agency which provided the report, and (ii) the recipient's right to receive a free copy of that report. But the Ninth Circuit's decision added to this list by also requiring an explanation of the specific "effect" of the action upon the consumer, as well as a series of disclosures regarding "affiliated" entities uninvolved with the particular transaction – if not also an identification of the exact information at issue in the report. The Ninth Circuit's decision further departs from the statute by imposing joint and several liability for the failure to craft an appropriate notice.

The Ninth Circuit's decision flies in the face of the FCRA's express mandate; is so ill-defined as to be difficult, if not impossible, for businesses to follow; invites litigation over the form of notice; and will cause confusion instead of reducing it.

The Ninth Circuit's Error as to "Willful" Violations of the FCRA

The FCRA contains a clear distinction between different levels of liability for "willful" and non-willful violations of its terms. A "willful" violation carries with it the potential liability for unlimited punitive damages, while non-willful violations are addressed by less severe remedies. Differentiating between the two levels of liability reflects a purposeful choice by Congress to treat more severely those who act to violate the

FCRA despite knowing (or intentionally blinding themselves to the fact) that their actions are unlawful.

The Ninth Circuit's decision construing these provisions of the FCRA effectively erases the distinction between "willful" and non-willful violations of the statute. The Ninth Circuit's decision redefines "willful" to encompass even actions which are negligent and unintended. Still worse, the Ninth Circuit's decision significantly erodes (if not eliminates) consultation with counsel as a defense against allegations of "willful" violations of the FCRA, and even invites discovery into the well-established privilege that protects confidential deliberations between attorney and client.

The Ninth Circuit's decision is also contrary to the well-reasoned case law of other federal Courts of Appeal which have considered this issue. A "willful" violation of the FCRA should be limited to incidents in which a party acts in derogation of the statute knowing that such actions are unlawful, or deliberately avoiding such knowledge. Consultation with counsel regarding unsettled areas of law under the FCRA ought to be a meaningful, if not dispositive, defense against a "willful" violation of the statute.

Other federal statutes which utilize the same or similar language and remedial structure as the FCRA – such as the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Family and Medical Leave Act – have been so construed by this Court, as well as by other federal courts (including the Ninth Circuit). But the Ninth Circuit's decision threatens those holdings and exposes the nation's businesses to inconsistent treatment of the same behavior. Indeed, the Ninth Circuit's decision would punish behavior which for other purposes is considered good-faith and even exculpatory.

If left undisturbed, the Ninth Circuit's decision will undermine the guidance provided by the FCRA to the nation's business community, and replace it with uncertainty as to how to prevent the devastating liability which can accompany "willful" violations of the statute.

REASONS FOR GRANTING THE WRITS

The Petitions for Writs of *Certiorari* should be granted. The Ninth Circuit's decision presents a well-developed split in authority between the Circuits, and is erroneous in two important ways: (1) its holding as to what constitutes an "adverse action" and corresponding notice under the statute; and (2) its holding as to what is a "willful" violation of the FCRA.

If permitted to stand, the Ninth Circuit's decision will introduce unfairness, uncertainty and confusion to the countless transactions which occur every day, in every part of the country, and in every sector of the economy.

I. THE NINTH CIRCUIT'S CREATION OF NEW "ADVERSE ACTION" STANDARDS IS ERRONEOUS AND HARMFUL TO BUSINESSES AND CONSUMERS

The Ninth Circuit's decision is a radical departure from the statutory bases for an "adverse action" under the FCRA. While Petitioners have articulated numerous reasons why the Ninth Circuit's decision is not based in law and how it will needlessly disrupt the provision of insurance, the full impact of the decision is hardly limited to the insurance industry. If left to stand, the Ninth Circuit's decision will influence the FCRA practices of all other industries which consult credit reports, leading to unfairly burdensome requirements and confusing communications to consumers in all sectors of the economy.

A. The Ninth's Circuit's "Adverse Action" Holding Would Harm Insurers and Their Consumers

The Ninth Circuit's decision is likely to mislead consumers rather than inform them. Under the Ninth Circuit's holding, an "adverse action" occurs each time an insurer declines to offer a consumer the "best possible rate," based in any way upon the contents of that consumer's credit report. *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1093 n.11 (9th Cir. 2006). However, it is infeasible for insurers to offer their "best possible rate" to more than a small percentage of their customers – at least, not while still hoping to stay in business. Accordingly, under the Ninth Circuit

decision, all other consumers seeking insurance – that is, the vast majority of consumers – would automatically receive an adverse action notice upon applying for insurance. *Id.*

This would be particularly misleading in instances when an insurer used a consumer's favorable credit report to offer the consumer a rate ***better*** than that which would have been offered but for the information obtained from the credit report. In such a case, the ***consumer benefits*** from a review of her credit report. Likewise, the ***insurer benefits*** from a better understanding of a potential customer and its own exposure to risk. And yet, under the Ninth Circuit decision, the insurer would be obligated to send the consumer an "adverse action" notice if the more attractive rate offered to the consumer was anything less than the insurer's "best possible rate."

That outcome disserves both the business and the consumer. Although the insurer obtained information which contributed to a more positive experience for the consumer, the insurer nevertheless would imperil the consumer's good will by sending the consumer a notice that the insurer had "acted adversely" toward her. In the same way, although the consumer is financially better-off because the insurer consulted her credit report, her receipt of an "adverse action" notice would lead her to believe the opposite were true. This is simply not what an "adverse action" should entail.[2]

This result is as much at odds with common sense as it is with the FCRA. The Ninth Circuit decision should not be allowed to stand.

B. The Ninth Circuit's "Adverse Action" Holding Would Harm Businesses, Consumers, Employees and Job-Seekers in All Industries

The Ninth Circuit's decision also imperils businesses and individuals in contexts other than the purchase of insurance.

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[2] For example, Black's Law Dictionary defines "adverse" as "opposed; contrary; in resistance or opposition to a[n] . . . application." Black's Law Dictionary 53 (6th Ed. 1990). Offering a consumer a better rate is hardly an action taken "in opposition to an application" or otherwise "adverse" to the consumer's interests. *Id.*

Most vulnerable to burdensome requirements and consumer confusion as a result of the Ninth Circuit's decision are parties involved in licensed occupations and the administration of government benefits, as well as employers across all fields of endeavor.

1. The Harm from Applying the Ninth Circuit's Holding to Government Instrumentalities

The statutory text erroneously construed by the Ninth Circuit in this case also appears in the provisions of the FCRA addressed to eligibility for governmental licenses and other state benefits. *See* 15 U.S.C. § 1681a(k)(1)(B). As such, the statute itself would appear to invite application of the Ninth Circuit's holding to those contexts, as well – thereby only compounding the confusion strewn by this incorrect decision.

Specifically, the FCRA defines "adverse action" in the insurance context as:

> ***[A] denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of*** coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

The FCRA uses the very same language to define "adverse action" as it relates to a "consumer's eligibility for a license or benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status:"

> ***[A] denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of,*** any license or benefit described in section 604(a)(3)(D).

See 15 U.S.C. § 1681a(k)(1)(B)(iii) (emphasis added).[3]

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[3] Section 604(a)(3)(D) of the FCRA provides that a person may obtain a consumer report for the purpose of determining a "consumer's eligibility for a license or other benefit granted by a governmental

(Continued on following page)

This identical statutory language, coupled with the paucity of case law construing Section 1681a(k)(1)(B)(iii) of the FCRA, raises the very real possibility that the Ninth Circuit's erroneous interpretation of what constitutes an "adverse action" will be imported to apply to governmental entities conferring licenses or benefits. Accordingly, those regulatory agencies – as well as the businesses and individuals who apply for those licenses and benefits – will find themselves in the same positions as insurers and applicants for insurance policies. Under the Ninth Circuit's "adverse action" mechanism, these activities, too, would be characterized by a deluge of unnecessary and confusing "adverse action" notices.

2. The Harm from Applying the Ninth Circuit's Holding to Employment-Related Background Checks

The statutory text erroneously construed by the Ninth Circuit is also shared by the sections of the FCRA regarding background checks in the context of applications for employment or promotion. Again, this renders the Ninth Circuit's errors unlikely to be contained solely within the market for insurance. To the contrary, the language of the statute facilitates the application of that erroneous decision to the nation's job-seekers in all fields of employment.

In particular, the FCRA defines "adverse action" in the insurance context as ***any "adverse or unfavorable change in the terms of"*** insurance coverage." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

Similarly, the FCRA defines "adverse action" in the employment context as any decision which ***"adversely affects any current or prospective employees."*** 15 U.S.C. § 1681a(k)(1)(B)(ii). That is, the FCRA treats an "adverse action" substantially similarly for both insurance and employment purposes: namely, it can be anything that adversely affects an individual's interests.

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instrumentality required by law to consider an applicant's financial responsibility or status." 15 U.S.C. § 1681b(a)(3)(D).

Consider the impact of applying the Ninth Circuit's holding to employers which conduct background checks for prospective and current employees. Nearly all employers in the United States fall into this category. According to the Society of Human Resource Management's "Reference and Background Checking Survey Report" (January 2005), approximately ***96% of all employers*** conduct background checks of some kind, including credit history reports, as to job applicants or employees.

Under the Ninth Circuit's holding, would all of these employers need to dispatch "adverse action" notices in every instance in which an applicant is not offered the "best possible position"? For example, if an individual indicates on his job application that he is interested in several different positions, and ultimately is hired for one of them (or even another position altogether), is there an "adverse action" if that position is somehow less desirable than the others in which he was interested? Or if that position is deemed relatively less attractive than the "best possible position"?

These results are equally as absurd as requiring an insurer to send an "adverse action" notice as a result of using an applicant's credit report to offer him a better rate on insurance. And yet that is exactly the confusion that the Ninth Circuit's decision would cause among the vast number of American employers who utilize background checks as a factor in their decisions to hire or promote.

3. The Harm from Applying the Ninth Circuit's Holding to Employment-Related "Pre-Adverse Action" Notices

Employers and job applicants would also feel the burden of the Ninth Circuit's decision in other ways. Specifically, the FCRA imposes upon employers who are contemplating taking an adverse action for an employment purpose the additional requirement of sending a "pre-adverse" action letter prior to actually taking the "adverse action." 5 U.S.C. § 1681b(b)(3). Under the Ninth Circuit's expansion of the amount of "adverse actions," so too would the number of "pre-adverse action" notifications dramatically increase.

In addition to the overwhelming burden upon businesses of trying to comply with such a regime, this poses two very real alternatives in the nation's workplaces. Either:

- Job applicants and employees alike would be inundated with "pre-adverse action" and "adverse action" notices such that their intended effect – allowing consumers to correct incorrect information before it could be acted upon – would be lost; or
- Employers would be inundated with inquiries regarding these "adverse actions" taken as to every job applicant, newly hired employee, promoted employee and employees who applied for promotion, to the detriment of activities that actually maintain and grow their businesses so that hiring can occur.

Both of these results are contrary to the FCRA, because they would render meaningless the statute's "adverse action" notice requirements. *See, e.g., Beck v. Prupis,* 529 U.S. 494, 506-07, 120 S. Ct. 1608, 1617 (2000) (restating "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous"); Hearing, Senate Committee on Banking, Housing & Urban Affairs, 108th Congress 95-96 (2003) (Testimony of J. Howard Beales III, Director of Federal Trade Commission) (consumers will ignore notices if received too frequently).

Nor would it be appropriate if this erroneous reading of the FCRA operated as a disincentive to employers to conduct background checks. Such inquiries are an important safeguard against ills which vary from theft and violence in the workplace, to identity theft, to liability for negligent retention or hiring. Moreover, the provision of such background screening services is itself a significant part of the American economy. *See, e.g.,* KPMG Corporate Finance LLC, "The Market is Undergoing Dramatic Change. What Are the Opportunities For Your Business?" Background Screening, Fall 2003 (employment-related background checks approximately a $2 billion annual business). There would be no avoiding the detrimental impact of the Ninth Circuit's decision upon all manner of employers, employees and job applicants.

C. The Ninth Circuit's Creation of New Requirements for "Adverse Action" Notices Is Erroneous and Harmful to Businesses, Consumers, Employees and Job-Seekers

The Ninth Circuit also erred by departing from the plain language of the FCRA and introducing new requirements for the contents of an "adverse action" notice. The text of the FCRA is unambiguous and detailed regarding what an "adverse action" notice must contain. *See* 15 U.S.C. § 1681m(a). The Ninth Circuit disregarded these clear standards, replaced them with ill-defined and confusing new requirements, and left open the possibility that still more could be added by judicial re-drafting of the statute.

The FCRA plainly states that upon taking an "adverse action" based upon a credit report, a business must provide the consumer with a notice that conveys two basic pieces of information about the "adverse action":

(1) The contact information of the consumer reporting agency which furnished the report, along with a disclaimer that such agency did not make the "adverse action" decision and is therefore unable to provide the reasons why the action was taken; and

(2) The consumer's right to receive a free copy of the report within sixty days, and to dispute inaccurate or incomplete information contained in the report.

15 U.S.C. § 1681m(a).

The Ninth Circuit's decision disregards these clear requirements and instead adds a third, which is found nowhere in the text of the statute: that the notice must also ***"specify the effect of the action upon the consumer."*** *Reynolds*, 435 F.3d at 1095 (emphasis added).

Still further beyond the statute, the Ninth Circuit also held that if an "adverse action" notice is issued by an entity belonging to a group of "affiliated" entities, the notice must also "describ[e] the adverse effect of [the] credit report within that family of companies," "identif[y] those companies and their respective roles," and "explain the actions each affiliated

company took." *Id.*, 435 F.3d at 1096. Under the Ninth Circuit's holding, failure to provide a conforming notice would result in ***"joint and several liability"*** among all such "affiliated" companies, even those which had no involvement whatsoever with the consumer or transaction at issue. *Id.* (emphasis added).

But the Ninth Circuit's novel construction of the statute does not even stop there. In a footnote, the Ninth Circuit invites the question of whether a notice should *also* contain "a fuller description of what specific information was adverse" to the consumer. *Id.*, 435 F.3d at 1095 n.14 (emphasis added).

The Ninth's Circuit decision is contrary to the most basic and long-established element of statutory construction: that an unambiguous statute means what it says. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 187, 124 S. Ct. 1587, 1596 (2004) ("Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction") (quoting *United States v. Fisher*, 6 U.S. 358 (1805)). For this reason alone, the Ninth Circuit's decision is erroneous and should be reversed.

But just as with the other aspects of the Ninth Circuit's holding, this is about more than an appellate court making a wrong decision. By fundamentally changing – and expanding – the required contents of an "adverse action" notice, the Ninth Circuit holding is poised to spread confusion throughout a far wider cross-section of the American economy than just the insurance industry.

To revisit an example discussed above, the Ninth Circuit decision would leave businesses guessing as to how to state the adverse "effect" upon an employee of being placed in a better job than she would have been eligible for if the business had not checked her credit report. Similarly confusing would be how to convey the adverse "effect" where a job applicant was offered the highest-paying job for which he applied, but not the highest-paying or otherwise "best" position which was available at the business. Add to this the need to identify and explain the workings of "affiliated" entities wholly removed

from the event at hand, and composing (much less deciphering) a compliant notice would be nonsensical, if not impossible.

And yet the failure to do so might be considered a "willful" violation of the statute, with attendant, potentially unlimited liability for entire groups of "affiliated" companies. No one – businesses, licensing agencies, employers, employees, or job applicants – would benefit from the Ninth Circuit's decision. All would be worse off for it.

II. THE NINTH CIRCUIT'S "WILLFULNESS" HOLDING IS ERRONEOUS AND HARMFUL TO BUSINESSES AND EMPLOYERS

The Ninth Circuit erred in its construction of the FCRA provision allowing for enhanced remedies in the event of a "willful" violation of the statute. 15 U.S.C. § 1681n(a). As addressed at length in the Petitions, the Ninth Circuit's holding is contrary to the bedrock principles of statutory interpretation and invariably leads to absurd and unfair results. For these reasons alone, the holding should be reviewed and reversed.

But of particular concern to the memberships of the Chamber and the Roundtable are two potentially devastating effects of the Ninth Circuit's holding: (1) the uncertainty caused by the Ninth Circuit's departure from the established case law of other federal courts of appeal; and (2) the risk of liability for actions which have consistently been treated as good-faith and exculpatory under other federal statutes which utilize the same language and remedial structure as the FCRA.

A. The Harm Caused by the Ninth Circuit's Erroneous Interpretation of a "Willful" Violation of the FCRA

The Ninth Circuit's novel and unfairly expansive definition of a "willful" violation of the FCRA presents businesses across all industries with uncertainty and the prospect of catastrophic liability, even for good-faith attempts to comply with the statute. That result ought not stand.

1. The Importance of Clearly Defined Rules of Liability

The FCRA plainly distinguishes between non-willful and "willful" violations of its terms. To this end, the FCRA specifically provides that in the event of "***negligent noncompliance***" with the statute, a business's liability is limited to a plaintiff's actual damages. 15 U.S.C. § 1681o (emphasis added). On the other hand, the FCRA expressly provides that in the event of "***willful noncompliance***" with the statute, a business's liability includes not only actual damages, but also a possible award of unlimited punitive damages. 15 U.S.C. § 1681n(a) (emphasis added).

This distinction is meaningful, yet the Ninth Circuit's holding threatens to collapse it by rendering even unintentional and well-meaning violations of the statute eligible for the imposition of exemplary damages. Such an outcome would be potentially devastating to all the businesses across the nation whose operations depend upon a clear understanding of the FCRA. Those businesspeople need to know – indeed, they deserve to know – whether they stand to be punished for good-faith reliance upon the advice of counsel regarding unsettled issues under the FCRA. By massively expanding liability under the FCRA, the Ninth Circuit not only ignores the plain meaning of the FCRA, but the well-reasoned holdings of other federal courts of appeal.

2. The Ninth Circuit's Holding Is Contrary to the Established Case Law of Other Federal Courts of Appeal

The Ninth Circuit's interpretation of a "willful" violation of FCRA is a significant departure from the prior case law construing that provision of the statute. Those decisions held that a violation is not "willful" if, before engaging in the conduct at issue, the defendant takes steps to ascertain whether its actions will be violative of the law.

For example, the Sixth Circuit has held that a defendant cannot "willfully" violate the FCRA if the defendant "obtained [the consumer's] reports 'under what is believed to be a proper purpose under the statute but which a court

. . . later rule[s] to be impermissible'" under the statute. *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (quoting *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 370 (6th Cir. 1984) (concurring opinion)).

Other federal Courts of Appeal have likewise limited "willful" violations of the statute to instances in which a party acts with the understanding that its actions are not permitted. In the words of the Eighth Circuit, a "willful" violation of the FCRA is nothing less than the "knowing and intentional commission of an act the defendant knows to violate the law." *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002). The Seventh Circuit has expressed this threshold in even more detail: "[t]o act willfully, a defendant must knowingly and intentionally violate the [FCRA], and it 'must also be conscious that [its] act impinges on the rights of others.'" *Wantz v. Experian Information Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) (citations omitted).

These cases are also entirely consistent with this Court's own articulation of the core concept that:

> ***punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.***

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521 (2003) (citations omitted) (emphasis added). For these reasons, this Court has repeatedly

> admonished that punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.

Id., 538 U.S. at 417, 123 S. Ct. at 1520 (internal quotation and citations omitted).

These cases, and this Court, have it right where the Ninth Circuit's decision has it wrong. In all of the FCRA cases

decided in other circuits, the defendant was protected from the most severe sanctions under the FCRA where the defendant lacked the knowledge that the actions at issue violated the statute. Of particular note – and particular importance to the business and legal communities – ***none*** of these cases suggest that a business can be subjected to such penalties for taking the advice of a lawyer regarding a matter of first impression under a statute, if a subsequent judicial decision reaches a different conclusion than that of the lawyer.

The Ninth Circuit's decision improperly inverts this state of affairs. By holding that reliance upon the advice of counsel "is not dispositive" of the issue of willfulness, the Ninth Circuit has eliminated the clear guidance that is vital to the FCRA and the businesses which operate under it. *Reynolds*, 435 F.3d at 1099. And the Ninth Circuit's decision stands to cause even more disruption, in that under the decision, "[w]hether or not there is a willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on . . . the testimony of the companies' executives and counsel." *Id.*

In other words, the Ninth Circuit's decision stands for the proposition that the mere allegation of "willfulness" may allow for discovery into the underlying legal advice and opinion, along with attendant erosions of the confidential relationship between attorneys and their clients. With one stroke, the Ninth Circuit decision eliminated any meaningful guidance and protection for businesses that must practice under the FCRA, increased the likelihood of litigation under the statute, and compromised the attorney-client relationship. That decision should not be permitted to stand.

B. The Uncertainty Caused by the Effect of the Ninth Circuit's Decision upon Other Statutes

The Ninth Circuit's decision is also likely to lead to uncertainty and inconsistent results under other federal statutes which utilize the same language and structure regarding "willful" violations of their terms. Like the FCRA, these statutes play key roles in regulating the nation's workplaces and jobs. If allowed to stand, the Ninth Circuit's decision would cause the same behavior –

conferring with counsel – to lead to dramatically different results under these substantially similar statutes.

1. The Age Discrimination in Employment Act

For example, the Age Discrimination in Employment Act ("ADEA") provides that "liquidated damages shall be payable only in cases of ***willful*** violations" of the statute. 29 U.S.C. § 626(b) (emphasis added). Like the FCRA, the ADEA does not expressly define "willful." *Id.*

In determining what is a "willful" violation of the ADEA, this Court held that "willfulness" was limited to instances in which the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126, 105 S. Ct. 613, 624 (1985). Accordingly, in the *Trans World* case, this Court reversed an award of liquidated damages because the employer conferred with counsel in attempting to determine whether its proposed actions would violate the ADEA. *Id.*, 469 U.S. at 130, 105 S. Ct. at 626.

This Court reaffirmed its definition of "willful" in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617, 113 S. Ct. 1701, 1710 (1993), and further explained that the statute's extra-compensatory damages provision did ***not*** apply where "an employer incorrectly but in good faith and non-recklessly believes that the statute permits a particular age-based decision." *Id.*

The Ninth Circuit's definition of "willful" under the FCRA is a distinct departure from this well-established level of culpability. Permitting that construction to stand would not only cause a split of authority under the FCRA, but also open a split between that statute and the ADEA. Businesses that make a good-faith effort to know and comply with these laws ought not be subjected to extreme penalties under one statute for the same behavior that is commended as exculpatory under the other.

2. The Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA") is another statute of the utmost importance to businesses and employees across the nation. *See* 29 U.S.C. Sec. 216(e). Like the ADEA, the FLSA also includes enhanced penalties for "willful"

violations of its terms, without providing a definition of what is a "willful" violation. *See* 29 U.S.C. §§ 216(e), 255(a) (extending limitation period for claims arising out of "willful violation" of statute), 626(b) ("liquidated damages shall be payable only in cases of *willful* violations" of statute).

Courts – ***including the Ninth Circuit*** – have consistently held that a "willful" violation of this statute requires cognition or deliberate indifference to the terms of the statute. As the Ninth Circuit itself held, a "willful" violation occurs only when the "employer disregards the very 'possibility' that it was violating the statute." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-09 (9th Cir. 2003).

The Ninth Circuit's decision in this case posits a markedly different view of "willfulness." Consultation with counsel should refute the contention that a possible violation of the statute was disregarded; but the Ninth Circuit's decision would enable "willful" violations to be found even after seeking legal advice. Again, given the substantial similarity of language and remedial schemes in the FCRA and the FLSA, a business should be treated similarly under both statutes. The Ninth Circuit's decision in this case undoes that result and leaves inconsistency and uncertainty in its place.

3. The Family and Medical Leave Act

Still another statute of general application, the Family and Medical Leave Act ("FMLA"), also provides for enhanced remedies in the event of a "willful" violation of its terms. *See* 29 U.S.C. § 2617(c)(2) (limitation period extended for claims arising out of "willful" violations of statute). And as with the other statutes discussed above, courts have held that a "willful" violation means "deliberately [choosing] to avoid researching the law's terms or affirmatively [evading] them." *Hoffman v. Professional Med. Team*, 394 F.3d 414, 419 (6th Cir. 2004).

A businessperson who consults with her counsel can hardly be said to have "deliberately chosen to avoid researching the law's terms or affirmatively evade them." Yet under the Ninth Circuit's holding in this case, the very same conduct could constitute a "willful" violation of the FCRA. There is no sense to be made of this dichotomy, and no guiding principles to be taken from it.

C. The Importance of Statutory Protection for this Nation's Businesses and Employers

There is no question that the FCRA and these other statutes provide important protections for consumers and employees. But these statutes ***also*** provide crucial protection for businesses and employers, by informing them how to conduct their business without transgressing the law. *See, e.g., Duffy v. Landberg,* 215 F.3d 871, 874-75 (8th Cir. 2000) (Fair Debt Collection Practices Act protects consumers, and compliance also protects businesses against liability); *see also Jang v. A.M. Miller & Assoc.*, 122 F.3d 480, 483-84 (7th Cir. 1997).

The Ninth Circuit's holding extinguishes this protection under the FCRA. The Ninth Circuit's holding divests the statute of any meaningful guidance for individuals and entities striving to ensure their compliance with the statute, while introducing needless risk, uncertainty and inconsistency into what had been a settled area of law upon which American businesses rightfully relied. The Ninth Circuit's holding should be reversed.

CONCLUSION

For all of these reasons, and those stated by the Petitioners, the Petitions for Writs of *Certiorari* should be granted.

Respectfully submitted,

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MAR'A GHAZAL
BUSINESS ROUNDTABLE
1717 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 872-1260

CAMILLE A. OLSON*
GERALD L. MAATMAN
PAUL E. FREEHLING
CHRISTOPHER E. PAETSCH
PAMELA QUIGLEY DEVATA
SEYFARTH SHAW LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000

*Counsel of Record

Counsel for Amici Curiae

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Petitioner

v.

JASON JAY REYNOLDS

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,

Petitioners

v.

CHARLES BURR, ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL.,

Petitioners

v.

AJENE EDO

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.,

Petitioners

v.

JULIE WILLES

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

L. RICHARD FISCHER
BETH S. BRINKMANN*
SETH M. GALANTER
NATHAN D. TAYLOR
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544
**Counsel of Record*

August 21, 2006

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Financial Services Roundtable respectfully submits this brief as *amicus curiae* in support of the petitions for writs of *certiorari* in these four cases.[1]

INTEREST OF *AMICUS CURIAE*

The Financial Services Roundtable (Roundtable) represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers.

The Roundtable believes that the Ninth Circuit has gone far astray in its interpretations of the Fair Credit Reporting Act (FCRA). The Roundtable urges this Court to grant *certiorari* to address the scope of the statutory terms "adverse action" and "willfully." The Ninth Circuit's unprecedented construction of the term "adverse action" will significantly increase the number of notices that businesses must send to consumers under the FCRA, raising compliance costs for a host of industries without providing any material benefit to consumers. The Ninth Circuit's concurrent expansion of the term "willfully" to include mere recklessness has permitted class action lawsuits seeking statutory and punitive damages that could, in the aggregate, cost the insurance and other financial services industries billions of dollars, despite the absence of any showing of actual injury on the part of the plaintiffs.

The Roundtable therefore respectfully urges the Court to grant the petitions for writs of *certiorari* and to review

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[1] Letters from petitioners and respondents indicating their consent to the filing of *amicus curiae* briefs have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

and reverse the Ninth Circuit's errant judgments in these four cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues presented in these four petitions for writs of *certiorari* warrant review. This Court would benefit from granting *certiorari* in all four petitions because each petitioner could add valuable depth and focus to the statutory arguments in light of the factual circumstances present in each case. To the extent, however, that the Court is inclined to grant *certiorari* only in a single case and hold the other related petitions pending its disposition, the petition in *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, appears to be the best vehicle for the Court to review in order to correct the Ninth Circuit's erroneous interpretation of both the "adverse action" and "willfully" provisions of the FCRA.

I. A. Only a small number of consumers receive the lowest possible rate for insurance when those rates are based in part on information in a consumer report. The Ninth Circuit's unprecedented interpretation of the term "adverse action" in the FCRA to require notice to a consumer when an insurer issues him anything but the lowest possible rate will force insurance companies to issue tens of millions of pointless notices to consumers. That deluge of additional notices will provide consumers with little, if any, appreciable benefit, and may, in fact, harm consumers by overloading them with information and numbing them to the important notices they otherwise receive.

The Ninth Circuit's interpretation of "adverse action" in this case is contrary to the plain language of the FCRA. The FCRA adverse action requirements do not address a hypothetical comparison of the rate charged to a consumer with the rate available to all consumers with "more favorable" consumer report information. The statutory framework confirms this point.

There also is a risk that the Ninth Circuit's holding may be extended beyond insurance to credit transactions and other transactions governed by the FCRA, which would

increase the number of adverse actions notices astronomically, burying consumers in paper. The extension of the Ninth Circuit's erroneous interpretation to credit transactions could have a dramatic adverse effect on banks and other lenders.

B. The Ninth Circuit's holding that all parties who participate in a transaction that results in an adverse action are each liable for a failure to provide an adverse action notice finds no statutory basis in the FCRA. The Ninth Circuit's ruling threatens to expand the reach of FCRA liability to banks and other lenders for insurance transactions, far beyond the intent of Congress. The potential effect of such an interpretation would be significant.

II. The Ninth Circuit's substantial relaxation of the "willfully" requirement for the award of statutory and punitive damages under the FCRA imposes significant liability not intended by Congress. The Ninth Circuit held that, in order to establish the willfulness necessary to obtain these special damages, a plaintiff need not demonstrate that a defendant knew its action violated the FCRA, even though such knowledge is an essential part of the typical definition of willfulness employed when punishment is involved.

A. By adopting a more lenient standard than most (if not all) other circuits, the Ninth Circuit has become a magnet for nationwide class action lawsuits alleging a variety of technical violations of the FCRA. This is so because an allegation of "willfully" permits a plaintiff (or, more realistically, an attorney who identifies technical violations of the FCRA and then locates a plaintiff in whose name to sue) to demand statutory damages for certain FCRA violations of at least $100 and up to $1,000 on behalf of each member of a class, a remedy not available if such violations are negligent.

The driving force in this kind of case is not compensation for individual harm, but attorneys intent on extracting money for themselves and a class of uninjured consumers from companies that provide valuable services that may have engaged in unknowing technical violations of a complex regulatory statute. The size of these suits,

and the risk of hundreds of millions (if not billions) of dollars in statutory or punitive damages, sometimes can enable plaintiff attorneys to successfully obtain tens (if not hundreds) of millions of dollars in settlements from entities that can show they acted in good faith, but cannot be certain that they could defeat the Ninth Circuit's unorthodox standard of "willfully."

B. By reading the term "willfully" to encompass states of mind other than a knowing violation of the law, the Ninth Circuit ignored basic rules of statutory construction that weigh against such a low threshold for recovery of punitive damages. The rule of lenity applies to the "willfully" provision of the FCRA because it authorizes punitive damages, which impose penal sanctions. The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions also require the government to prove that a person acted "willfully" in order to establish criminal liability.

The structure of the FCRA also weighs strongly in favor of requiring a plaintiff to establish specific intent in order to recover punitive or statutory damages. In enacting the FCRA, Congress did not permit monetary remedies for every action that is later determined by a court to violate the FCRA. By limiting recovery of even actual damages to instances where a plaintiff can show a negligent violation of the FCRA, Congress necessarily understood that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff. The legislative history confirms that Congress rejected proposals permitting the award of statutory or punitive damages for gross negligence, a term often used interchangeably with recklessness.

Finally the requirement that a federal statute be read to avoid doubt about its constitutionality also supports an interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to not comply with the FCRA. The contrary interpretation of the term by the Ninth Circuit raises substantial questions

about the constitutionality of the statute in light of the Constitution's substantive limits on punitive damages awards. For offenses such as those created by the FCRA – which occur purely in the economic realm, pose nc risk to the health or safety of individuals, and do not target any particular set of persons – the absence of a requirement that the defendants have engaged in conduct knowing that it was unlawful would draw into significant question every award of punitive damages under the FCRA.

ARGUMENT

The Ninth Circuit's published decision in *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, was applied immediately in several unpublished opinions issued the same day. That interpretation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, has produced four petitions for writs of *certiorari*: *Hartford Fire Ins. Co. v. Reynolds*, No. 06-82; *Safeco Ins. Co. of Am. v. Burr*, No. 06-84; *Geico Gen. Ins. Co. v. Edo*, No. 06-100; and *State Farm Mut. Auto. Ins. Co. v. Willes*, No. 06-101.

All four *certiorari* petitions challenge the Ninth Circuit's unduly expansive view of what showing is sufficient to establish that a defendant "willfully" violated the FCRA so as to trigger the availability of statutory and punitive damages. Each of the four petitions is an appropriate vehicle in which the Court could address that important question on which the circuits are divided because each of the Questions Presented on the "willfully" issue appears adequately broad to allow the Court to resolve all the necessary issues.

Three of the petitions also seek review of the Ninth Circuit's erroneous construction of a different and equally important provision of the FCRA that defines "adverse action" for various purposes, including for when businesses must provide certain notices to consumers. This "adverse action" issue affects the day-to-day operations of financial services entities subject to the FCRA and could pose substantial compliance burdens on them with no material benefit to consumers regardless of how the "willfully" issue is

resolved. These three petitions thus merit review by this Court on the adverse action issue as well.

This Court would benefit from granting *certiorari* in all four cases because each petitioner could add valuable depth and focus to the statutory arguments as well as useful clarity in light of the varied factual circumstances present in each case. To the extent, however, that the Court is inclined to grant *certiorari* only in a single case and hold the other related petitions pending its disposition, the petition in *State Farm*, No. 06-101, appears to be the best vehicle for the Court to address the "adverse action" and "willfully" provisions of the FCRA. The scope of the Question Presented in each of the petitions on the "adverse action" issue is somewhat different. The question in the *State Farm* petition,[2] however, is broad and encompasses the question in *Geico*.[3] Also, resolution of the question in *State Farm* is antecedent to the question in *Hartford*,[4] which focuses only on the required content of an adverse action notice and not on the threshold question of whether a notice is required.[5]

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[2] "Whether the Ninth Circuit Court of Appeals erred in interpreting key statutory terms in the definition of 'adverse action' in the Fair Credit Reporting Act, 15 U.S.C. § 1681a(k)(1)(B)(i), so as to expand the reach of that definition far beyond its plain meaning, thus substantially increasing the statutory obligations on insurance companies to notify consumers of purported 'adverse actions' and creating vastly expanded potential liabilities under the statute?" *State Farm*, No. 06-101, Pet. at i.

[3] "Whether the Ninth Circuit improperly expanded § 1681m of FCRA by holding that an 'adverse action' has occurred and notice is required thereunder, even when a consumer's credit information has had either no impact or a favorable impact on the rates and terms of the insurance that would otherwise have been offered or provided?" *Geico*, No. 06-100, Pet. at ii.

[4] "Whether the Ninth Circuit erred in creating new and open-ended disclosure requirements for adverse action notices beyond the discrete list expressly set forth in Section 615 of FCRA, 15 U.S.C. § 1681m(a)." *Hartford*, No. 06-82, Pet. at i.

[5] A factor that may become significant arose in the *Hartford* case subsequent to the filing of that petition. Hartford has informed the Securities and Exchange Commission that, after it filed its petition for *certiorari* in this matter, "the parties entered into a memorandum of

(Continued on following page)

I. Review Is Warranted To Correct The Ninth Circuit's Expansive Interpretation Of The FCRA's "Adverse Action" Definition, Which Otherwise Will Have A Substantial Negative Effect On The Conduct Of The Financial Services Industry Nationwide

The Ninth Circuit erroneously interpreted the term "adverse action" for purposes of the FCRA in a manner that is contrary to the plain language of the statute. In doing so, the Ninth Circuit held that any consumer who does not receive the lowest possible rate has suffered an adverse action, that every entity that participates in that action is liable for failure to provide an adverse action notice, and that each adverse action notice must contain detailed information far beyond that identified in the FCRA itself. The potential impact of this erroneous ruling on the insurance industry is quite significant, and its impact may extend far beyond to other industries as well.

A. The Ninth Circuit's Holding That The Failure Of A New Customer To Receive The Lowest Possible Rate Constitutes An "Adverse Action" By The Insurer Will Require The Issuance Of Millions Of Useless Notices And Is Wrong As A Matter Of Statutory Interpretation

Under the FCRA, if an insurance company takes an "adverse action" with respect to a consumer in connection with its underwriting decision, based at least in part on a consumer report that it obtained in connection with the underwriting under 15 U.S.C. § 1681b(a)(3)(C), the insurance company must provide the consumer with notice of the adverse action. *See id.* § 1681m(a)(1). The FCRA

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understanding setting forth the essential terms of a class settlement in this action. The settlement is subject to certain contingencies, including preliminary and final approval by the district court." The Hartford Financial Services Group, Inc., Quarterly Report (Form 10-Q), at 86 (July 27, 2006).

defines the term "adverse action" for insurance as "a denial or cancellation of, *an increase in any charge for*, or a reduction or other adverse or unfavorable change in the terms or coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." *Id.* § 1681a(k)(1)(B)(i) (emphasis added).

The Ninth Circuit erroneously held that the phrase "an increase in any charge for" insurance coverage includes an initial purchase of new insurance where the consumer is charged a rate that is higher than what the consumer would have been charged if his score, based on information from his consumer report, was the "top potential score." *State Farm*, No. 06-101, Pet. App. 43a. Under that interpretation, an adverse action occurs whenever a "consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable." *Ibid.*

1. The Ninth Circuit's unprecedented interpretation of the term "adverse action" to include issuance of anything but the best insurance coverage at the lowest possible rate will force insurance companies, and possibly other financial services institutions, to issue tens of millions of pointless notices to consumers.

The effect of the Ninth Circuit's holding on insurance companies will be dramatic. Only a small number of consumers will receive the lowest possible rate for insurance when those rates are based in part on information from the consumer reports. At many insurance companies that rely in part on such information to set rates, fewer than 15% of insureds receive the best rate available. *See* Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance*, Apps. C & D (2002). As a result, the Ninth Circuit's holding will require insurance companies to provide adverse action notices to nearly all consumers who purchase insurance, *i.e.*, all but the small group who have the "best" scores and receive the lowest possible rates. Because the majority of consumers nationwide must obtain automobile and/or homeowner's insurance, the Ninth Circuit's holding will require businesses to produce and send tens or hundreds of millions of additional adverse action

notices each year. *See* C.A. Br. for Property Cas. Ins. Ass'n of Am. as *Amici Curiae* Supporting Pet. for Reh'g *En Banc* at 2 (filed Nov. 14, 2005) (insurers in 2005 issued approximately 24 million homeowners policies and 48 million personal automobile policies using credit information).

Congress could not have intended such an absurd result. The Federal Trade Commission cautioned Congress to this effect when Congress was addressing revisions to the FCRA. It explained how important it was "to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong., 529 (2003) (testimony of Joel Winston, Associate Director, Bureau of Consumer Protection, Federal Trade Comm'n).

That deluge of additional notices will provide consumers with little, if any, appreciable benefit, and may, in fact, harm consumers. For example, the notices may confuse or mislead consumers who receive insurance at favorable rates because of their good credit histories, but not at the lowest possible rates. In addition, as more adverse action notices are provided, there is a real risk that the effectiveness of the notices intended by Congress will be substantially diluted. Consumers may begin to treat the notices as boilerplate disclosures that should be ignored. *See Senate Hearings*, *supra*, at 95-96 (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) ("[I]f you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore."); *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (discussing problem of "informational overload").

Also, the flood of additional notices will undercut their statutorily intended function – focusing consumers on potential material inaccuracies in their consumer reports. For example, a consumer with a good credit history who obtains insurance at a favorable rate, but receives an adverse action notice, could spend unnecessary time investigating a consumer report for material inaccuracies that do not exist.

2. The Ninth Circuit's interpretation of "adverse action" is contrary to the plain language of the FCRA. The relevant portion of the statute specifies that an adverse action occurs only if consumer report information is used, in whole or in part, to "increase [the] charge for" insurance coverage for that consumer. As a result, if a consumer receives *the same rate or a better rate* than she would have received if her consumer report information had not been considered, an adverse action has not occurred because the consumer report information did not result in an increase in the charge for the insurance coverage for that consumer.

The FCRA adverse action notice requirements are triggered when information in a consumer report has an actual and negative impact on a consumer's insurance rate. They do not address a hypothetical comparison of the rate charged to the consumer with the rate available to all other consumers with "more favorable" consumer report information.

The statutory framework confirms this point. Each adverse action notice entitles the recipient to a free consumer report from the consumer reporting agency. *See* 15 U.S.C. § 1681j(c). If Congress had intended the FCRA adverse action requirements to generate free consumer reports to nearly all consumers, Congress would not have needed to amend the FCRA in 2003 to require that consumer reporting agencies provide consumers with a free consumer report once each year upon request, *see id.* § 1681j(a)(1)(A), because the only consumers not already receiving them would be the small number of consumers with the top credit scores who have no need for them.

3. There is a risk that the Ninth Circuit's holding may be extended beyond insurance to credit transactions and other transactions governed by the FCRA, which would increase the number of adverse actions notices astronomically, burying consumers in paper. *Cf. Senate Hearings*, *supra*, at 48 n.15 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) (each day, two to three million consumer reports subject to the FCRA are issued).

Application of the adverse insurance ruling in this case should not apply in the context of credit because the FCRA

specifies that, in the credit context, the term "adverse action" "has the same meaning as in" the Equal Credit Opportunity Act. 15 U.S.C. § 1681a(k)(1)(A). That Act, in turn, defines "adverse action" to mean "a denial or revocation of credit," 15 U.S.C. § 1691(d)(6), and its implementing regulations make clear that if a consumer applies for credit at a specific rate but the lender makes a counteroffer at a different rate, there is no adverse action if the consumer accepts the lender's counteroffer, *see* 12 C.F.R. § 202.2(c).

There is yet another definition of "adverse action" in the FCRA, however, that at least one court has applied in the credit context. That definition of "adverse action" provides that an adverse action is one that is "made in connection with an application * * * made by, or a transaction * * * initiated by, any consumer" and is "adverse to the interests of the consumer." 15 U.S.C. § 1681a(k)(1)(B)(iv). Congress intended this "miscellaneous" definition to apply to transactions other than credit or insurance, as indicated by the transaction-specific definitions of adverse action and the legislative history. *See Senate Hearings*, *supra*, at 53 & n.46 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n). The Seventh Circuit, however, in a conclusory opinion that finds no basis in the statute, erroneously held that the "miscellaneous" definition can apply to credit transactions. *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 982 (7th Cir. 2004).

There is a significant risk that courts could conclude that, under the Ninth Circuit ruling at issue here, if a consumer is charged a rate for credit that is higher than the rate that the consumer would have been charged if his or her credit score was the "top potential score," the lender has taken an action that is "adverse to the interests of the consumer" within the miscellaneous definition of "adverse action" in the FCRA. The extension of the Ninth Circuit's erroneous interpretation to credit transactions could have a dramatic adverse effect on the compliance activities of banks and other lenders, similar to the effect of the Ninth Circuit's decision on insurance companies.

B. The Ninth Circuit's Holding That All Parties Who Participate In A Transaction That Results In An Adverse Action Are Liable For A Failure To Provide An Adverse Action Notice Threatens To Disrupt Settled Expectations Of The Financial Services Industry

The Ninth Circuit held that all parties who participate in an insurance adverse action are liable for any failure to provide an adverse action notice. *State Farm*, No. 06-101, Pet. App. 47a. The Ninth Circuit opined that Congress did not "intend[] that only a single company be responsible * * * when a consumer is charged an increased rate for insurance." *Id.* at 48a. The Ninth Circuit found that when a consumer is charged an increased rate for insurance and no adverse action notice is provided, the party that makes "the decision as to which of the" affiliated insurance companies will issue the policy will be subject to liability along with the company that issues the policy. This holding finds no statutory basis in the FCRA.

The Ninth Circuit's ruling threatens to expand the reach of FCRA liability for insurance transactions to banks and other lenders, far beyond the intent of Congress. Courts may be persuaded that a bank or other lender is deemed responsible, along with an insurance company, for the failure to provide an adverse action notice in connection with an "increase in the charge" for certain types of insurance coverage that are closely related to credit products. For example, a bank may obtain mortgage insurance to protect the bank from a borrower's default on a mortgage loan. If the bank selects the mortgage insurance company to underwrite the policy based on consumer report information, the Ninth Circuit's interpretation suggests that the bank could be liable under 15 U.S.C. § 1681s(b) along with the insurance company for failure to provide an adverse action notice if the rate charged for the mortgage insurance is not the lowest possible rate.

Similarly, if a consumer wishes to obtain credit-life or credit-disability insurance to protect against default on a credit product obtained from a bank and the bank selects

the insurance company that will receive the consumer's insurance application based on consumer report information, a bank might face liability under 15 U.S.C. § 1681s(b) in the Ninth Circuit if the rate charged for the insurance is not the lowest possible rate and no adverse action notice is provided.

The potential effect of such an interpretation would be significant. Banks and other lenders could find themselves facing enforcement actions for an insurance adverse action that they did not take.

II. Review Is Also Warranted On The Proper Interpretation Of The FCRA's "Willfully" Requirement To Correct The Ninth Circuit's Expansive And Erroneous Interpretation That Permits Recovery Of Unwarranted Punitive Damages And Enables Nationwide Class Actions For Statutory Damages

The Ninth Circuit's substantial relaxation of the "willfully" requirement for the award of statutory and punitive damages under the FCRA imposes significant liability not intended by Congress. The FCRA ensures that any individual who has been injured as a result of a negligent violation of certain of the FCRA's obligations is entitled to compensatory relief for that injury. 15 U.S.C. § 1681o(a)(1). In addition, where a defendant "willfully failed to comply" with such FCRA obligations, *id.* § 1681n(a), Congress authorized uncapped punitive damages and statutory damages of at least $100 and up to $1,000 for each consumer.

The Ninth Circuit held that in order to establish willfulness, a plaintiff need not establish that a defendant knew its action violated the law, even though such knowledge is an essential part of the typical definition of willfulness employed when punishment is involved. *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 196 (1998); *Ratzlaff v. United States*, 510 U.S. 135, 149 (1994). Instead, relying on a short line of cases that involve extending statutes of limitations and doubling lost wages awards for labor law violations, the Ninth Circuit held that a plaintiff can

establish that a defendant acted "willfully" by demonstrating that the defendant acted "either knowing that the policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *State Farm*, No. 06-101, Pet. App. 53a.

The Ninth Circuit acknowledged that its "reckless disregard" view of the *mens rea* required to establish "willfully" under the FCRA conflicts with both the Sixth Circuit and the Eighth Circuit. *State Farm* Pet. App. 54 n.17. As all the petitioners demonstrate, the Ninth Circuit's standard to determine "willfully" is also contrary to the great weight of other circuit authority.

A. The Ninth Circuit's Ruling Will Permit A Dangerous Array Of Class Actions Seeking Millions Of Dollars In Statutory Damages Without Any Proof Of Actual Harm

By adopting a more lenient standard than most (if not all) other circuits, the Ninth Circuit has become a magnet for nationwide class action lawsuits alleging a variety of technical violations of the FCRA. *See Safeco*, No. 06-84, Pet. at 13 & n.5 (citing recent filings); *see also Hartford*, No. 06-82, Pet. at 23 (hundreds of class actions alleging FCRA violations have been filed in the past two years). This is so because an allegation of "willfully" permits a plaintiff (or, more realistically, an attorney who identifies certain technical violations of the FCRA and then locates a plaintiff in whose name to bring a class action) to demand statutory damages of up to $1,000 on behalf of each member of a class, a remedy not available for negligent violations under Section 1681o.

By avoiding the need to establish actual damages, if any, incurred by each individual member of a class, a "willfully" allegation increases the likelihood that a class composed of a large number of individuals will be certified as a damages class action under Federal Rule of Civil Procedure 23(b)(3). *See, e.g., Ashby v. Farmers Ins. Co. of Oregon*, 2004 WL 2359968 (D. Or. Oct. 18, 2004) (class of at least 130,000 insureds); *Cavin v. Home Loan Ctr., Inc.*,

2006 WL 1313191 (N.D. Ill. May 10, 2006) (class of approximately 49,000 members); *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450 (W.D. Okla. Apr. 13, 2006) (class of over one million insureds).

Respondent Willes's complaint in the *State Farm* litigation, which is typical of other alleged FCRA violations plaintiffs seek to litigate as class actions, made no claim that petitioners' actions were negligent or that she personally suffered any actual damages. Instead, her complaint at the time it was dismissed by the district court alleged only willful misconduct and sought only statutory and punitive damages on behalf of a class. *State Farm* Third Amended Complaint (D. Or. Dkt. No. 35) at 4. The allegations in the three other FCRA cases in which *certiorari* petitions are pending are also silent as to the actual harm, if any, suffered by the named plaintiffs and likewise seek only non-compensatory damages for a class.

The driving force for such class actions is not compensation for individual harm, but attorneys intent on extracting money for themselves and a class of uninjured consumers from companies that provide valuable services (and their shareholders) that may have engaged in unknowing technical violations of a complex regulatory statute. *Cf. id.* at 4 ¶ 18 (respondent's counsel "are experienced in class action securities litigation").

The size of these suits, and the risk of hundreds of millions (if not billions) of dollars in statutory or punitive damages, sometimes can enable plaintiff attorneys to successfully obtain tens (if not hundreds) of millions of dollars in settlements from entities that can show they acted in good faith, but cannot be certain that they could defeat the Ninth Circuit's unorthodox standard of "willfully." *See* note 5, *supra*; Fed. R. Civ. P. 23, Advisory Committee's note (1998) (money class actions may force many defendants "to settle rather than incur the costs of defending a class action and run the risk of ruinous liability"); *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (class action for statutory damages "could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem*

effect on defendants, which may induce unfair settlements"); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.); *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995).

B. The Ninth Circuit Ignored That A "Willfully" Finding Triggers The Availability Of Punitive Damages, A Disfavored Penal Remedy Subject To Significant Constitutional Limitations

A finding that a defendant acted "willfully" allows an award of punitive damages in suits for all violations of FCRA that can be privately enforced. By reading the term "willfully" to encompass states of mind other than a knowing violation of the law, the Ninth Circuit ignored basic rules of statutory construction that weigh against such a low threshold for recovery of punitive damages.

1. Punitive damages are an "extraordinary sanction." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979). "[B]y definition [they] are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981). Punitive damages "serve the same purposes as criminal penalties," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003), and "have been described as 'quasi-criminal,'" *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citation omitted).

The rule of lenity applies to statutes that authorize punitive damages because punitive damages impose penal sanctions. *See* 3 Norman J. Singer, *Sutherland Statutory Construction* § 59.2, at 121 (6th ed. 2001) (collecting cases applying rule of lenity to statutes awarding punitive damages). The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions require the government to prove that a person acted "willfully" in order to establish criminal liability. *See* 15 U.S.C. §§ 1681q,

1681r; *Ratzlaff*, 510 U.S. at 143 ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

Thus, to the extent that the term "willfully" is ambiguous, it must be read narrowly for purposes of the felony provisions and the punitive damages provisions to protect defendants from punishment. *See Ratzlaff*, 510 U.S. at 148 ("were we to find [the statute's] 'willfulness' requirement ambiguous * * *, we would resolve any doubt in favor of the defendant"). The Ninth Circuit, however, in conflict with other circuits, rejected the reading most favorable to defendants and did not require that plaintiffs show that a defendant had a specific intent to violate the FCRA.

2. The structure of the FCRA weighs strongly in favor of requiring a plaintiff to establish specific intent in order to recover punitive damages. The FCRA is a technical statute that, even decades after its enactment, is still the subject of much uncertainty. When Congress uses the term "willfully" in such "highly technical statutes" that present "the danger of ensnaring individuals engaged in apparently innocent conduct," a defendant must know "that his conduct was unlawful" in order to be liable. *Bryan*, 524 U.S. at 194-195.

In enacting the FCRA, Congress did not permit monetary remedies for every action that is later determined by a court to violate the FCRA. By limiting recovery of even actual damages to instances where a plaintiff can show a negligent violation of certain FCRA provisions, Congress necessarily understood that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff.

Furthermore, the legislative history confirms that Congress rejected proposals permitting the award of statutory or punitive damages for gross negligence, a term often used interchangeably with recklessness. *See Safeco*, No. 06-84, Pet. at 20-21 (describing legislative history); *Geico*, No. 06-100, Pet. at 22 (same). For all these reasons,

the Ninth Circuit erred in not reading the FCRA "willfully" requirement to incorporate a specific intent standard.

The court of appeals disregarded this analysis and, instead, adopted the recklessness standard that this Court employed in interpreting the term "willful" in the Age Discrimination in Employment Act (ADEA) and the Fair Labor Standards Act. *State Farm*, No. 06-101, Pet. App. 53a (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). In neither of those statutes, however, does the willfulness determination trigger an award of punitive damages.

In one provision common to both statutes, at issue in *McLaughlin*, a willfulness finding extends the statute of limitations for bringing suit from two years to three years. *See* 29 U.S.C. § 255(a). In another provision under the ADEA, at issue in *Thurston* and *Hazen Paper*, a finding of willfulness permits a court to award an amount equal to the amount of lost wages as liquidated damages. *See* 29 U.S.C. § 626(b). That liquidated damages remedy, this Court has held, is "compensation, not a penalty or punishment" and serves as remuneration for "damages too obscure and difficult of proof," *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-584 (1942), and as a substitute for prejudgment interest, which is not available, *see Powers v. Grinnell Corp.*, 915 F.2d 34, 39-41 (1st Cir. 1990) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-716 (1945)). The Court made clear that the term "willful" in those statutes was ambiguous and that its meaning in any statute is dictated by the history and structure of the statute. *See McLaughlin*, 486 U.S. at 132-133 (reviewing structure of statute and legislative history); *Thurston*, 469 U.S. at 125-128 (same).

3. Finally, the requirement that a federal statute be read to avoid doubt about its constitutionality also supports an interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to not comply with the FCRA. The contrary interpretation of the term by the Ninth Circuit

raises substantial questions about the constitutionality of the statute in light of the Constitution's substantive limits on punitive damages awards.

The Due Process Clause prohibits unreasonable punitive damages awards and "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). In assessing reprehensibility, a court must consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Ibid.*

Under these factors, the FCRA requirement that a plaintiff establish that a defendant "willfully" failed to comply with the FCRA in order to be eligible for punitive damages must be interpreted to require proof that a defendant knew that its conduct violated the FCRA so as to not raise constitutional doubt. For offenses such as those created by the FCRA – which occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particular set of persons – the absence of a requirement that the defendant engaged in conduct "knowing or suspecting that it was unlawful" would draw into significant question every award of punitive damages under the FCRA. *Gore*, 517 U.S. at 576; *see id.* at 580 ("the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists").[6]

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[6] The FCRA authorization of statutory damages raises the same serious constitutional doubt under the Ninth Circuit's interpretation because the Due Process Clause prohibits the award of statutory damages that have no relationship to the amount of actual injury

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There is no basis in the text, structure, or history of the FCRA that would sustain the Ninth Circuit's minority view of "willfully." Yet given the availability of nationwide class actions, the Ninth Circuit's view will be the one to which defendants will often be subjected. Such a holding requires immediate review from this Court.

CONCLUSION

For the reasons set forth above and in the petitions for writs of *certiorari*, the Court should grant all the petitions. To the extent this Court grants a single petition, it should grant the petition in *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, and hold the remaining petitions pending decision in *State Farm*, and then dispose of them as appropriate in light of that decision.

Respectfully submitted,

L. RICHARD FISCHER
BETH S. BRINKMANN*
SETH M. GALANTER
NATHAN D. TAYLOR
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544

**Counsel of Record*

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suffered unless there is a showing of specific intent to violate the law. *See Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915) (statutory damages of $100 per day for refusing customer phone service violated due process when company's action was in good faith, impartially applied, consistent with longstanding practice, and done in the absence of any state ruling that conduct was unreasonable, rulings elsewhere that like conduct was reasonable, and weight of differing opinions on company's side); *see also Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (statutory damages of $500 for overcharging customer $3 violates due process because damages were "grossly out of proportion to the possible actual damages").

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Nos. 06-82, 06-84, 06-100, & 06-101

In the Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY, PETITIONER
v.
JASON RAY REYNOLDS, RESPONDENT

SAFECO INSURANCE COMPANY OF AMERICA, *ET AL.*, PETITIONERS
v.
CHARLES BURR, *ET AL.*, RESPONDENTS

GEICO GENERAL INSURANCE COMPANY, *ET AL.*, PETITIONERS
v.
AJENE EDO, RESPONDENT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *ET AL.*, PETITIONERS
v.
JULIE WILLES, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR FREEDOMWORKS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

GENE C. SCHAERR*
STEFFEN N. JOHNSON
JEFFREY M. ANDERSON
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

**Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Fair Credit Reporting Act requires an insurance company to notify a consumer of an "adverse action" whenever it offers a policy at a rate greater than the rate the company might have offered if the consumer had perfect credit.

2. Whether an insurance company may be liable for punitive damages for "willful" violation of the Fair Credit Reporting Act based solely upon a finding that it acted with "reckless disregard" of the statutory notice requirement.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

In the decisions below, the Ninth Circuit has interpreted the Fair Credit Reporting Act (FCRA) in a way that not only conflicts with decisions in other circuits, but also, because of the Ninth Circuit's importance in our national economy, threatens to undo many of the benefits that FCRA has heretofore provided to both consumers and businesses nationwide. The Ninth Circuit's expansive interpretation of FCRA's notice requirement threatens to increase the costs of compliance for users of credit information while decreasing the likelihood that consumers will actually benefit from "adverse action" notices. Moreover, in its equally expansive interpretation of the "willfulness" standard for punitive damages, the Ninth Circuit has departed from the near-uniform position of other federal courts of appeals, opening the door to punitive awards even where users of credit information relied in good faith on the advice of counsel in determining their obligations under the statute. These results are not consistent with the text or structure of FCRA, and they threaten to disrupt the efficiency of the consumer credit market and increase the costs of credit nationwide—to the ultimate detriment of consumers. This Court's intervention is urgently needed to avoid that unfortunate result.

FreedomWorks Foundation, like its affiliate FreedomWorks (formerly known as Citizens for a Sound Economy), has a strong interest in these cases. It is a nonprofit, nonpartisan organization dedicated to promoting free-market solutions to economic problems at the state and national levels. Indeed, for more than two decades, FreedomWorks and its predecessors and affiliates have been a leading voice on a range of economic policy

issues, from taxation and regulation to entitlement reform, competitiveness, and consumer protection.[1]

FreedomWorks is especially interested in the proper interpretation and application of the Fair Credit Reporting Act (FCRA). In 2003, FreedomWorks' chief economist testified before a congressional subcommittee on the effectiveness of FCRA and the importance of uniform national standards for sharing financial information. See *Fair Credit Reporting Act: How It Functions for Consumers and the Economy: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 108th Cong. 66-68, 229-233 (2003) (statement and testimony of Wayne T. Brough). As he explained there, FreedomWorks believes FCRA has been instrumental in creating an efficient and highly integrated framework for sharing consumer credit information, a framework that has produced greater opportunities for consumers to obtain such credit. FCRA's success results from a well-considered policy not to restrict the free flow of information, but to provide reasonable standards that protect consumer privacy.

FreedomWorks believes this Court should grant review and reverse the decisions below to give FCRA the uniform nationwide interpretation that its plain terms require, and to ensure that the statute continues to foster the efficient consumer credit market that Congress contemplated.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

"In recent years, there has been a proliferation of class action lawsuits brought under the [FCRA]," in part because of "the availability of fee shifting and statutory damages, and the lack of a class action damages cap." David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006). In nationwide class actions, these statutory damages—$100 to $1000 per violation—threaten insurance companies and other covered entities with "crushing liability" that could have "adverse effects on both the national economy and * * * employees." *Trans Union LLC* v. *FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of certiorari).

The cases now before the Court are nationwide class actions filed in the District of Oregon. The named plaintiffs allege that their insurers (and all those companies' affiliates) willfully violated FCRA by failing to provide notice of "adverse actions" that resulted from evaluation of applicants' credit information. The named plaintiffs seek statutory damages of $100 to $1000 for each class member, as well as punitive damages and attorney's fees. The district court granted summary judgment in favor of the insurance companies, but the Ninth Circuit reversed.

The Ninth Circuit held that the defendants in these nationwide class actions were not entitled to judgment as a matter of law and that the named plaintiffs' claims should be decided by juries. *First*, the court adopted an expansive definition of "adverse action" for purposes of FCRA's notice requirement. FCRA provides that any person who "takes any adverse action with respect to any customer that is based in whole or in part on any information contained in a consumer report" must give "notice of the adverse action to the consumer." 15 U.S.C. § 1681m(a). With respect to insurance, the statute defines an "adverse action" as "a denial or cancellation of, an

increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B)(i).

According to the Ninth Circuit, "an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price." *Reynolds* v. *Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1091 (9th Cir. 2006). Thus, "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA" and must provide an adverse-action notice. *Id.* at 1092. According to the Ninth Circuit, FCRA "requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top *potential* score." *Id.* at 1093 (emphasis added).

Second, the court held that the insurance companies could be liable for "willful" violations of the notice requirement even if they sought, and relied on, the advice of counsel in determining that notice was not necessary. The statute provides that "[a]ny person who willfully fails to comply with any requirement under [FCRA] with respect to any consumer is liable to that consumer" for actual (or statutory) damages, punitive damages, and attorney's fees. 15 U.S.C. § 1681n.

Following the Third Circuit—but contrary to decisions of the Sixth, Seventh, and Eighth Circuits—the Ninth Circuit held that the term "willfully" in FCRA "entails a conscious disregard of the law, which means either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in *reckless disregard* of whether the policy [or action] contravened those rights." *Reynolds*, 435 F.3d at 1098 (emphasis added) (quotations omitted).

In adopting this reckless-disregard standard for willfulness, the court expressed concern about "perverse

incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 1099. "Because a reckless failure to comply with FCRA's requirements can result in punitive damages," the court reasoned, "insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute." *Ibid.* Under the Ninth Circuit's rule, a company's liability for punitive damages now depends upon whether its counsel's advice is "tenable, albeit erroneous" or "implausible" and "indefensible." *Ibid.*

SUMMARY OF ARGUMENT

The decisions below warrant review because they misinterpret FCRA in ways that will both impede the effectiveness of information-sharing in the consumer credit market and increase the cost of doing business. By requiring insurers to give notice to consumers whenever they charge a rate, based on the consumer's credit information, that is higher than the rate they would otherwise charge, the decisions below significantly increase the cost of FCRA compliance and effectively require that notice be given to every insurance applicant whose credit rating is less than perfect. Moreover, reading the statute to require notice to consumers in such a broad range of circumstances threatens to dilute the effect of credit-related notices that consumers *do* need to receive—by converting "adverse action" notices into white noise that consumers will come to ignore.

What is more, by lowering the bar of liability for "willful" violations, the decisions below impose significant burdens on insurance companies (and others) that merely use credit information for legitimate risk assessment purposes.

All of these results upset Congress's calibration of regulatory requirements and portend higher costs for

consumers seeking credit without providing them with corresponding benefits. And the effect will be felt by millions of consumers, because the notice requirement applies to all users of credit reports, the "adverse action" definition applies to all insurance companies that rely on credit reports, and the "willful" violation provision applies even more broadly—to every business that is covered by FCRA. Indeed, since these cases are nationwide class actions, the decisions below not only pose a danger of devastating liability for the insurance companies involved, but they may also effectively set nationwide standards of both liability and care.

Equally important, the decisions below represent a departure from the standards applied in most other courts of appeals throughout the country. Division among the courts of appeals on an issue affecting so many businesses itself warrants a grant of certiorari. Disparity undermines the chief virtue of FCRA—uniform standards governing national markets.

But the Ninth Circuit's decisions pose an additional threat. Given the circuit's expansive territory and the scope of the markets its rulings govern—comprising nearly 20 percent of the Nation's gross domestic product in 2004—the decisions below will also create extraordinary pressure for firms operating nationwide to conform their conduct in *all* jurisdictions to the court's broad reading of FCRA's notice requirements, simply to avoid having to enforce divergent notice policies in different offices. Thus, absent this Court's intervention, the Ninth Circuit's decision may, as a practical matter, be the last word on the standard that many companies apply in seeking to comply with FCRA. But that makes no sense: the authoritative interpretation of FCRA should come from this Court, not a single court of appeals that happens to have a large geographic jurisdiction.

ARGUMENT

The decisions below reflect fundamental misreadings of two key provisions of FCRA that affect millions of credit transactions nationwide. By construing the notice requirement to apply whenever a consumer obtains credit on terms less advantageous than might be available to a hypothetical "perfect" consumer, the decisions below impose significant burdens on users of credit reports while diminishing the utility of adverse-action notices to consumers. And by construing the term "willful" to include mere recklessness, the decisions below ensure that users of credit reports will face heightened risks of punitive damages liability that can be mitigated only by second-guessing the advice of counsel and interpreting FCRA in the most restrictive manner possible. The decisions below thus place on FCRA a judicial gloss that imposes significant additional compliance costs on businesses, but without corresponding benefits to consumers.

I. The Ninth Circuit's Expansive Reading Of FCRA's Notice Requirement Is Far Broader Than Congress Intended, To The Ultimate Detriment Of Consumers.

As this Court has noted, "Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001) (citing 15 U.S.C. § 1681(a)). To accomplish these objectives, the statute regulates "consumer reporting agencies" that generate "credit reports" for use in determining consumers' eligibility for credit, insurance, and employment. See 15 U.S.C. §§ 1681a, 1681b. Under the statute, reporting agencies are required to take steps to assure accuracy in credit information, to limit the disclosure of credit information to appropriate parties, and to give consumers access to their credit information so they can correct any mistakes. See *id.* §§ 1681(b), 1681b, 1681g.

In addition, FCRA regulates *users* of credit reports such as the insurance companies here. See *id.* § 1681m. Insurance companies, like other credit providers, use credit reports in assessing risks. Under FCRA, users of credit reports must give consumers notice of so-called "adverse actions" taken based on their credit information. *Id.* § 1681m(a)(1). As shown below, the Ninth Circuit has misinterpreted these provisions, and has done so in a way that threatens to destroy many of FCRA's benefits to consumers and businesses alike.

A. The Ninth Circuit's Interpretation Of FCRA's "Adverse Action" Provision Is Inconsistent With The Statutory Text.

FCRA defines "adverse action" in various commercial contexts, including the extension of credit, provision of insurance, employment decisions, and government licensing. See *id.* § 1681a(k)(1). In the insurance context, an "adverse action" is "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B).

Nothing in the statute, however, compels the Ninth Circuit's conclusion that an adverse-action notice is required "whenever a consumer pays a higher rate because his credit rating is *less than the top potential score*." *Reynolds*, 435 F.3d at 1093 (emphasis added). Indeed, the statute makes no reference to the hypothetical perfect credit rating. Rather, it focuses on a *change* in the price or terms of insurance offered to a specific consumer with specific actuarial characteristics as well as a specific credit rating. If a consumer receives an offer of insurance at a certain price and on certain terms based on non-credit-related characteristics, he is adversely affected by his credit rating only if the insurer, after considering the credit rating, *changes* the offer by raising the price or reducing the coverage or otherwise making the terms less

favorable. The relevant comparison is between (1) the consumer described by all his characteristics except his credit rating and (2) the same consumer described by all his characteristics including his credit rating. It is not between the real-life consumer and the Platonic Form of creditworthiness.

B. The Ninth Circuit's Interpretation Of FCRA's "Adverse Action" Provision Undermines The Policy Objectives Of The Statute.

Not only does the Ninth Circuit's rule exceed the plain meaning of the statute and defy common sense, but it also upsets the delicate balance of interests that Congress struck when it enacted the statute. Congress enacted FCRA recognizing that "[t]he banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

1. Reliable credit information is essential to risk assessment and pricing decisions in the consumer credit market. As FreedomWorks' chief economist has explained, there is "a strong statistically significant correlation" between "credit scores [and] loss." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 232 (testimony of Wayne T. Brough). "Overall, research and creditor experience has consistently indicated that credit reporting company information, despite any limitations that it may have, generally provides an effective measure of the relative credit risk posed by prospective borrowers." Robert B. Avery, *et al.*, *An Overview of Consumer Data and Credit Reporting*, Federal Reserve Bulletin 47, 51 (Feb. 2003).

Thus, it should come as little surprise that insurance companies use credit information for legitimate risk-assessment purposes:

> [I]nsurance companies have used the information in credit scores as a risk characteristic to help predict future losses. This allows companies to price products more efficiently, while covering their costs. Risk classification allows insurers to divide individuals into groups with similar claims and set prices based on the probability of future loss. Driving history, age and gender are common variables to classify risk, but increasingly insurance scores with credit have been found to be more reliable predictors of future risk.

Fair Credit Reporting Act: How It Functions for Consumers and the Economy, supra, at 67 (statement of Wayne T. Brough).

Insurers' use of credit information helps consumers in two distinct ways. First, it enables insurers to set prices for insurance based on likely risk, which keeps them from setting prices unnecessarily high. "Restricting credit history information as an underwriting tool," by contrast, "would result in higher costs for insurers and higher premiums for policyholders." *Id.* at 233 (testimony of Wayne T. Brough).

Second, use of consumer credit histories improves the fairness of risk classification and thereby increases the availability of insurance to classes of consumers who otherwise might go without coverage. "[W]hen consumer credit histories are used as an underwriting criterion, they tend to increase the fairness and accuracy of risk classification. * * * With the ability to classify risk more accurately, insurers gain the ability to provide a wider array of products that can be offered to customers they otherwise could not serve." *Id.* at 232 (testimony of Wayne T. Brough).

2. This is in keeping with Congress' own goals in passing FCRA. Even as Congress recognized that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers," it sought to respond to the

"need to [e]nsure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(3)-(4). Thus, FCRA reflects Congress' judgment on the appropriate balance of efficiency in the credit market and reasonable consumer protection: it "strikes a balance between the privacy interests of consumers with respect to the contents of their credit reports and the need of businesses to access the information required to make accurate real time assessments of consumer qualifications." S. Rep. No. 108-166, at 5 (2003).

FCRA promotes efficiency in the consumer credit market by maintaining credit providers' ability to make decisions based on consumers' actual experiences. At the same time, however, FCRA protects consumers by ensuring that they are made aware of the impact of their credit reports in the marketplace. Indeed, FCRA's notice requirement facilitates the free flow of information by requiring users of credit information to alert consumers when they are "taxed"—by higher rates or less favorable terms—because of their credit ratings. These adverse-action notices benefit consumers by (1) showing them how their credit standing affects their position in the marketplace, and (2) enabling them quickly to identify and correct errors in their credit reports.

The balance that Congress struck in FCRA between allowing businesses to use credit histories while providing consumers with notice of genuinely adverse credit-related actions has been vindicated by the performance of the nation's consumer credit market. Credit is available to more consumers today than ever before, undoubtedly (at least in part) because FCRA created a uniform national system of credit reporting that promotes efficiency in information-sharing, accuracy in risk assessment, and privacy for consumers. As one Federal Reserve Board official told Congress: "The ready availability of accurate, up-to-date credit information from consumer reporting

agencies benefits both creditors and consumers. Information from consumer reports gives creditors the ability to make credit decisions quickly and in a fair, safe and sound, and cost-effective manner. Consumers benefit from access to credit from different sources, vigorous competition among creditors, quick decisions on credit applications, and reasonable costs for credit. *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 431 (testimony of Dolores Smith).

3. By requiring insurers to notify consumers of an "adverse action" every time insurers use consumer credit histories as a basis for charging a rate higher than the lowest hypothetical rate, the Ninth Circuit's reading of FCRA increases the cost of using such credit information and threatens harm to consumers both in the form of increased prices and decreased availability for those who are at risk of not getting coverage. This Court's review is warranted to prevent that result.

Moreover, gratuitous adverse-action notices actually *undermine* the important functions that Congress intended such notices to perform. The more notices a consumer receives, the less importance he will attach to any particular notice and the less attention he will pay to all such notices. As the director of the Federal Trade Commission's Bureau of Consumer Protection has explained, "if you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore. The adverse action notice, as it was originally envisioned, fit well in the set of circumstances where consumers needed to pay attention to the credit report and did not raise a lot of false alarms." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing, & Urban Affairs*, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III).

By requiring that notice be given "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *Reynolds*, 435 F.3d at 1093, the Ninth Circuit has ensured that there will be "a lot of false alarms" that will only devalue appropriate adverse-action notices. And by requiring that such notices identify *every affiliated entity* that participates in setting premium rates, see *id.* at 1096, the Ninth Circuit has ensured that consumers will be flooded with gratuitous information concerning a single transaction. Under the court of appeals' view, credit notices that consumers would ordinarily want to know about will be drowned out by the white noise of numerous meaningless reports that the court's expansive interpretation of "adverse action" requires.

In sum, the decisions below substitute the Ninth Circuit's theory of regulation for Congress' judgment on national economic policy. Requiring notice virtually every time an insurance company provides an initial policy—even when the consumer's credit information had no impact or a favorable impact on his ability to obtain credit—amounts to over-regulation that imposes additional costs on insurance companies without delivering additional benefits to consumers. This Court should grant the petitions to give a uniform interpretation to FCRA's notice requirement, one that is consistent with Congress' policy objectives and protective of consumers' interests in obtaining credit.

II. Contrary To The Decisions Of Most Other Circuits, The Decision Below Subjects Covered Businesses To Punitive Damages For Unwitting Violation Of FCRA's Requirements, Thereby Increasing The Cost Of Credit To All Consumers.

The Court should grant review for the additional reason that the decisions below aggravate a conflict among the federal courts of appeals on the meaning of the term

"willful" in FCRA. The Act subjects insurance companies to liability for actual damages, statutory penalties, *punitive damages*, and attorney's fees for "willful" violations of statutory requirements. See 15 U.S.C. § 1681n(a). As this Court has explained, "willful" is a term of "many meanings," and its proper interpretation is "often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998); *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *Spies* v. *United States*, 317 U.S. 492, 497 (1943).

In FCRA, Congress made a considered decision to reserve the drastic remedies of penalties and punitive damages for only the most egregious violations. The original Senate bill required the plaintiff to show that the defendant was "grossly negligent" to obtain *actual* damages, and that the violation was "willful" to obtain *punitive* damages. See S. 3678, 91st Cong. §§ 616, 617 (1970). Because gross negligence is equivalent to recklessness, see *Restatement (Second) of Torts* § 282 cmt. e (1965), the effect of the Senate bill was to distinguish misconduct that was merely reckless from misconduct that was more egregious, *i.e.*, "willful." Likewise, the House distinguished recklessness from willfulness, rejecting alternative versions of FCRA that would have authorized punitive damages for violations that were "grossly negligent or willful." See H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970). Thus, it was the unmistakable intention of Congress to set apart conduct that was more egregious than gross negligence (or recklessness) for punitive damages liability.

This policy is also manifest in FCRA's structure. For example, Section 1681n authorizes damages for "willful" violations in two different circumstances. For "willful" violations of most FCRA requirements, the statute provides that the consumer may receive actual damages of "not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). For "willful" violations of the prohibition against "obtaining a consumer report under false

pretenses or knowingly without a permissible purpose," the statute provides that the consumer may receive the greater of her actual damages or $1,000. *Id.* § 1681n(a)(1)(B). Because (1) "willful" must have the same meaning in both circumstances, see *Ratzlaf*, 510 U.S. at 143, and (2) the statute speaks of "willful" violation of a prohibition against obtaining a consumer report "*knowingly* without a permissible purpose," the term "willful" must entail *at least* actual knowledge in this context as well.[2]

Consistent with the legislative history and statutory structure, most federal circuits that have addressed the issue have concluded that a defendant may be liable for "willful" violation of FCRA only where it knowingly and consciously violated statutory mandates. *E.g.*, *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357 (8th Cir. 2002); *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409 (4th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424 (6th Cir. 1998); *Stevenson* v. *TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993).[3] As the Eighth Circuit explained in *Phillips*, "the defendant must commit the act that violates the Fair Credit Reporting Act with knowledge that he is committing the act * * * *and* he must also be conscious that his act impinges on the rights of others." 312 F.3d at

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[2] FCRA also provides a criminal penalty for "any person who *knowingly and willfully* obtains information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q (emphasis added).

[3] Although the Third Circuit previously adopted a "reckless disregard" standard, even that court recognized that a defendant's conduct must be "on the same order as willful concealments or misrepresentations" to warrant punitive damages. *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).

368 (emphasis added). Thus, in most federal circuits, a company cannot be liable for punitive damages where it mistakenly, but not deliberately, violates FCRA's notice requirement.

Not only does the Ninth Circuit's expansive interpretation of "willful" conflict with the interpretation uniformly applied by these other circuits, but it also creates significant practical problems for covered businesses and their counsel. Under the Ninth Circuit's rule, a business subject to FCRA may be charged with a "willful" violation—and thus be subject to punitive damages—*even if it did not know that it was violating the statute at all*, and even if it was merely following the advice of counsel on an unsettled legal issue under the statute.

Perhaps even more troubling is the Ninth Circuit's suggestion that a user of credit reports is subject to punitive damages for violating FCRA if its counsel's advice is "untenable" or "implausible" in the eyes of the court of appeals, *regardless of the fact that the district court agreed with its counsel's interpretation of the statute*. Indeed, the district court in these cases granted the insurance companies judgment as a matter of law on the ground that their interpretation of FCRA was correct.

Moreover, the burden appears to rest on the *defendant* to refute the claim for punitive damages: According to the Ninth Circuit, a business may be liable for punitive damages unless it "diligently and in good faith" sought to determine its statutory obligations and "thereby" took a "reasonable" or "tenable" position under the statute. *Reynolds*, 435 F.3d at 1099. Under this rule, the named plaintiff need do no more than assert that the defendant "willfully" (or without a good-faith basis) violated FCRA to survive a motion to dismiss.

This result increases the likelihood that covered businesses will bear the costs of punitive damages awards, either by paying large judgments or by entering into

"blackmail settlements" reflecting the potential for a high punitive award. As Judge Easterbrook has explained, settlement in such large-scale litigation "becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." See *In re Bridgestone/ Firestone, Inc.*, 288 F.3d 1012, 1015-1016 (7th Cir. 2002); see also Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) ("[w]hile the benefits to the individual class members are usually minuscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled").

In addition, this result will compel businesses to incur additional costs, either in conducting their operations in the most conservative manner, or in obtaining "second opinions" to test their own counsel's advice. This Court has recognized that, "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." *Upjohn Co.* v. *United States*, 449 U.S. 383, 392 (1981) (quotations omitted). And that is especially true in areas where compliance is "hardly an instinctive matter." *Ibid.* There is a cost associated with asking lawyers to approve business practices, and a risk associated with not asking. The pernicious effect of the decisions below is to *increase the cost* of the most responsible corporate behavior—consulting legal counsel before engaging in business practices regulated by federal statute. See *ibid.* (acknowledging the "valuable efforts of corporate counsel to ensure their client's compliance with the law").

These costs undoubtedly will be passed on to consumers, who will receive no additional benefit beyond that which ordinary remedies would provide. Here again, then, the decisions below amount to over-regulation by a court, inconsistent with the careful balance of interests that Congress struck when it enacted FCRA. The Ninth

Circuit's decisions undermine Congress' choice to reserve punitive damages for deliberate, conscious misconduct and conflict with the decisions of most other federal circuits, to the certain detriment of consumers nationwide. This Court should grant review to resolve the settled conflict among the courts of appeals and to establish a single standard for punitive damages liability under FCRA.

III. The Decisions Below Are Of Enormous Practical Importance Not Only To The Financial Services Industry, But To Consumers Of Their Services.

The practical impact of the decisions below also weighs heavily in favor of review. FCRA touches millions of consumer credit transactions each day, and it affects the routine business operations of banks, credit unions, insurance companies, mortgage lenders, and retailers nationwide. Given the scope of the statute's operation and the importance of consumer credit to our economy, the effects of the decisions below will reach far beyond the particular transactions at issue in these four cases. Indeed, as FreedomWorks' chief economist has explained: "[FCRA] has allowed the United States to develop one of the most efficient and sophisticated financial services markets in the world. Seventy-five percent of all households are participants in the market for consumer credit or mortgages." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 66 (statement of Wayne T. Brough).

Because FCRA regulates enormous numbers of credit-related transactions, the decisions below likely will spawn massive amounts of new litigation, the costs of which ultimately will be borne by consumers. "Each of the three national credit reporting companies has records on perhaps as many as 1.5 billion credit accounts held by approximately 190 million individuals. Credit reporting companies generally receive information from creditors and others every month, and they normally update their

credit records within one to seven days of receiving new information. According to industry sources, each of the three national credit reporting companies receives more than 2 billion items of information each month." Avery, *et al.*, *supra*, at 49. That is ample fodder for FCRA litigation, and because FCRA does not cap the amount of damages recoverable in a class action, the Court can be certain that new litigation will be large-scale and very expensive. See D. Permut & T. Moore, *supra*, at 931.

Moreover, simply because of the sheer size of the Ninth Circuit's territory in relation to the national economy, the decisions below likely will force financial services companies to modify or curtail their activities on a nationwide basis, resulting in further harm to consumers. In 2004, the nine States comprising the Ninth Circuit had gross state products totaling more than $2.3 trillion—nearly 20 percent of the Nation's gross domestic product for that year.[4] California's gross product alone was nearly $1.5 trillion,[5] making California's the sixth-largest economy in the world.[6] Insurance-related activities contributed more than $42.5 billion to the economies of the States comprising the Ninth Circuit,[7] and in 2005 more

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[4] See United States Department of Commerce, Bureau of Economic Analysis, *Gross State Product*, available at http://www.bea.gov/bea/regional/gsp.htm (visited Aug. 21, 2006).

[5] See *id.*

[6] See California Legislative Analyst's Office, *CalFacts 2004: California's Economy and Budget in Perspective*, available at http://www.lao.ca.gov/2004/cal_facts_2004_calfacts_econ.htm (visited Aug. 21, 2006).

[7] See Bureau of Economic Analysis, *supra*.

than $91.4 billion in direct premiums for property and casualty insurance were written in these States.[8]

To compensate for the added costs of providing gratuitous adverse-action notices and obtaining multiple legal opinions before engaging in practices regulated by FCRA—as required by the Ninth Circuit's decisions—banks, insurance companies, and other covered businesses may change the terms of the credit they extend or the prices or availability of products they sell to consumers nationwide. As a result, if the decisions below are allowed to stand, fewer consumers will have access to credit on terms advantageous to them.

* * * * *

The decisions below rest on fundamental misreadings of FCRA that significantly increase the costs of compliance with the statute. Users of credit reports and other covered businesses will pay those costs, but only in the first instance. They will pass those costs on to consumers, for whose benefit FCRA was enacted, in the form of higher prices and a narrower range of coverage. The decisions below thus amount to judicial over-regulation of the consumer credit market, and they should not be permitted to jeopardize FCRA's continued success in promoting the free flow of credit information while protecting consumer privacy.

CONCLUSION

The petitions for a writ of certiorari should be granted.

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[8] See Insurance Information Institute, *Direct Premiums Written, Property/Casualty Insurance By State, 2005*, available at http://www.economicinsurancefacts.org/economics/state/premiums.htm (visited Aug. 21, 2006).

Respectfully submitted.

GENE C. SCHAERR*
STEFFEN N. JOHNSON
JEFFREY M. ANDERSON
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

**Counsel of Record*

Counsel for Amicus Curiae

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IN THE

Supreme Court of the United States

HARTFORD FIRE INS. CO.,

Petitioner,

v.

JASON RAY REYNOLDS,

Respondent.

[Captions continued on inside cover]

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE MORTGAGE INSURANCE COMPANIES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

THOMAS M. HEFFERON
Counsel of Record
RICHARD M. WYNER
JOSEPH F. YENOUSKAS
GOODWIN | PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
Tel: 202-346-4000
Counsel for *Amicus Curiae*

August 21, 2006

[Captions continued from outside cover]

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

STATE FARM MUT. AUTO. INS. CO., ET AL.,
Petitioners,

v.

JULIE WILLES,
Respondent.

SAFECO INS. CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

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INTEREST OF THE *AMICUS CURIAE* [1]

The Mortgage Insurance Companies of America ("MICA") is a non-profit trade association that represents the private mortgage insurance industry in the United States. Its members are United Guaranty Corporation, Genworth Mortgage Insurance Corporation, Mortgage Guaranty Insurance Corporation, PMI Mortgage Insurance Co., Republic Mortgage Insurance Co., and Triad Guaranty Insurance Corporation.

MICA's members provide private mortgage insurance to mortgage lenders. Mortgage insurance protects a lender if the homeowner defaults on the loan. It allows those lenders to make low-downpayment loans, thereby expanding homeownership opportunities and enabling millions of Americans to become homeowners. Taken together, the private mortgage industry's seven companies insure over five million mortgages nationwide.[2]

MICA works to enhance understanding of the vital role that private mortgage insurance plays in housing Americans and of the issues faced by the mortgage insurance industry. Among MICA's missions is providing information to decisionmakers on issues concerning the obligations of companies that provide mortgage insurance. As such, MICA participates as *amicus curiae* in cases that may substantially affect such companies. See, *e.g.*, *Verex Assurance, Inc. v. Palma*, 519 U.S. 1048 (1996) (granting MICA's motion for leave to file an *amicus curiae* brief).

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[1] Written consents of all parties have been filed with the Clerk. This brief was authored solely by counsel for MICA, and no person or entity other than MICA, its members, or its counsel made any monetary contribution to the preparation or submission of the brief.

[2] The seventh company, Radian Guaranty Co., is not currently a member of MICA.

Mortgage insurers write policies with premium terms that may vary based on, among other things, information about the potential homeowner's creditworthiness. As a result, MICA's members have a strong interest in having this Court immediately review and correct the Ninth Circuit's decision for three reasons.

First, each of MICA's members has recently been sued in putative class actions arising under the Fair Credit Reporting Act ("FCRA") in which the plaintiffs allege, *inter alia*, that the mortgage insurers willfully violated FCRA by not providing notices of adverse action when the mortgage insurance policy premiums were affected by the borrowers' credit scores.[3] The Ninth Circuit's decision addresses issues that are also raised by those lawsuits, including the proper standard for determining whether any FCRA violation was willful, thus subjecting the defendant to punitive sanctions. Indeed, shortly after the Ninth Circuit's initial opinion was issued, it was cited by the plaintiffs in two of the cases pending against private mortgage insurers.[4]

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[3] See *Glatt v. PMI Group, Inc.*, No. 2:03-CV-00326-JES (M.D. Fla.); *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky.); *Preston v. Mortgage Guar. Ins. Corp. of Milwaukee*, No. 5:03-CV-111-Oc-10GRJ (M.D. Fla.); *Price v. United Guar. Residential Ins. Co.*, No. 3:03-CV-2643-R (N.D. Tex.); *Portis v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-300 (N.D. Ill.); *Karwo v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-1944 (N.D. Ill.); *Brantley v. Republic Mortgage Ins. Corp.*, No. 04-CV-805 (D.S.C.). In addition, a similar case is pending against Radian. *Whitfield v. Radian Guar. Co.*, No. 05-5017 (3d Cir.).

[4] See Plaintiff's Notice of Supplemental Authority, filed in *Whitfield v. Radian Guar., Inc.*, No. 04-111 (E.D. Pa. Aug. 11, 2005); Plaintiff's Notice of Supplemental Authority in Opposition to Triad's Motion for Summary Judgment, filed in *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky. Aug. 19, 2005).

Second, because the decision below conflicts with prior decisions from other Circuits, review is necessary to prevent forum shopping in future cases involving MICA's members. Mortgage insurers write policies covering properties located across the country, thereby raising a grave risk of forum shopping if the circuit split demonstrated in the petitions is allowed to persist.

Finally, beyond its effects on litigation, the Ninth Circuit's ruling would cause substantial harm to the private mortgage insurance industry and American homeownership. As explained below, the decision affects all aspects of FCRA, not just issues relating to adverse action notices, and will pressure mortgage insurers to consider adopting overly cautious practices in order to avoid the risk of punitive damages. The inevitable result of unnecessarily conservative approaches will be a restricted flow of consumer information, higher costs, and a decreased availability of risk-based priced mortgage insurance.[5]

ARGUMENT

The petitions in these cases correctly demonstrate that the Ninth Circuit's ruling both directly conflicts with decisions of numerous other courts of appeal and is patently wrong as a matter of statutory construction. The Ninth Circuit incorrectly construed the word "willfully" in 15 U.S.C. § 1681n as permitting an award of statutory and punitive damages whenever an appellate court concludes in hindsight that the defendant's position on an issue of first impression was "implausible," even if it was informed by legal advice about this complex statute.

As we now show, immediate correction of that idiosyncratic and erroneous ruling is vitally important. First, as

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[5] MICA respectfully reserves its members' rights to argue, at an appropriate time and in an appropriate context or forum, the application of the Ninth Circuit's opinion to a particular set of facts.

we show in Part I, the Ninth Circuit's decision will impact a wide swath of the economy, extending far beyond the circumstances of the individual cases before the Court. Although these cases primarily involve the adverse action notice requirements in the context of automobile insurance, the decision below will affect compliance with all of FCRA's substantive provisions by a broad array of industries. Second, as we show in Part II, the Ninth Circuit's ruling will immediately cause serious problems across the wide sweep of its impact. It will increase litigation and promote forum shopping in class actions against companies with multistate operations, like MICA's members; it will unduly pressure companies using consumer information in all of those nationwide operations, thus raising costs and effectively nullifying the contrary decisions of the other Circuit courts that have correctly interpreted the law; and it will inappropriately undermine the attorney-client privilege. These effects will be particularly pronounced because FCRA is a complex statute with numerous unresolved issues, each of which will be directly affected by the Ninth Circuit's ruling that "implausible" answers to unresolved issues can merit an award of punitive damages. Finally, these many adverse effects will be particularly problematic because, as Congress determined in enacting FCRA, the efficient flow of consumer information and the balancing of consumer and industry interests is of vital importance to the American economy.

I. THE DECISION BELOW WILL HAVE IMPACTS FAR BEYOND THE PARTICULAR CIRCUMSTANCES OF THESE CASES, INCLUDING ON THE MORTGAGE INSURANCE INDUSTRY

The cases before the Court primarily involve an alleged failure to comply with FCRA's adverse action notice requirement in the context of automobile insurance sales. But the Ninth Circuit's eccentric and wrongheaded articu-

lation of the standard for what constitutes a "willful" violation of FCRA will, absent correction, both affect numerous other industries, including mortgage insurance, and impact compliance with all of the Act's requirements, not only the giving of adverse action notices in the context of the use under certain circumstances of credit scores.

A. FCRA Affects Much of the Economy

FCRA affects a wide array of businesses. It imposes obligations not only on consumer reporting agencies (15 U.S.C. §§ 1681b, 1681v), but also on companies that furnish information to consumer reporting agencies (*id.* § 1681s-2) and, in certain circumstances, on users of information contained in consumer reports (*id.* § 1681m). Thus, although petitioners in these cases primarily are personal lines automobile insurers, the Ninth Circuit's interpretation of FCRA will impact many other segments of the economy. Indeed, as a general matter, retailers, employers, and government agencies each use consumer information for various purposes.[6]

The same is true throughout the housing industry. First, insurance companies that write homeowner's insurance policies frequently use the homeowner's credit scores in determining the premiums for such insurance.[7] Second, most companies that make mortgage loans use the homeowners' credit information in underwriting the risks of mortgage loans and determining the interest rates and other terms for those loans.[8] Finally, credit information may also be used in connection with the private mortgage insurance issued by MICA's members. Mortgage insurance policies are issued to

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[6] S. Rep. No. 103-209, at 1–2 (1993).

[7] See, *e.g.*, S. Rep. No. 108-166, at 7 (2003).

[8] *Id.*; see also U.S. Gen. Accounting Office, GAO Report No. 06-435, Mortgage Financing: HUD Could Realize Additional Benefits from its Mortgage Scorecard 5 (Apr. 2006) (discussing use of automated underwriting of loans using borrower credit scores).

mortgage lenders to protect them against the risk of payment defaults by the homeowners. The premium charged to the lender by the mortgage insurer is based on a variety of factors, including, in certain types of mortgage insurance policies, information contained in the homeowners' consumer reports. Indeed, as cited above, MICA's members are defendants in putative class actions alleging that they use consumer information and have disclosure duties under 15 U.S.C. § 1681m.

B. The Ninth Circuit's Willfulness Ruling Is Likely To Have an Impact on all of the Act's Substantive Provisions

FCRA imposes a variety of substantive duties beyond the adverse action notice provisions that the Ninth Circuit considered. For example, section 1681b sets forth permissible purposes for which consumer reporting agencies may furnish, and third parties may receive, consumer report information. 15 U.S.C. § 1681b. Sections 1681c, 1681g, and 1681i impose requirements with respect to the types of information that a consumer reporting agency may include in a consumer report, how consumer reporting agencies must disclose such information to consumers, and how disputes over accuracy are resolved by such agencies and by information furnishers. *Id.* §§ 1681c, 1681g & 1681i. Section 1681m imposes duties on users of information in consumer reports in certain circumstances. *Id.* § 1681m. And section 1681s-2(b) provides procedures for investigations by entities that furnish consumer information into certain disputes over the accuracy of consumer information. *Id.* § 1681s-2(b).

Moreover, the Act's provisions are not limited to the use of credit information, which was at issue in these cases. The duties under FCRA arise from use of information in consumer report[s], a term that Congress defined to include not only credit information, but also "any information * * * bear-

ing on a consumer's * * * character, general reputation, personal characteristics, or mode of living." *Id.* § 1681a(d)(1). That definition has been construed to include such data as driving record information,[9] social security numbers, and even nicknames.[10]

With some exceptions where private suits are barred (*e.g.*, *id.* § 1681s-2(c)), FCRA authorizes an award of statutory and punitive damages against "[a]ny person who willfully fails to comply with *any* requirement imposed under this subchapter." *Id.* § 1681n(a) (emphasis added). Thus, the Ninth Circuit's interpretation of the word "willfully" may affect compliance with, and lawsuits involving, a large number of FCRA's requirements. There are, for example, dozens of lawsuits now pending in which plaintiffs are seeking punitive damages on the ground that creditors and insurers did not make firm offers of credit or insurance when they sent out so-called "prescreened" solicitations to consumers, and thus allegedly violated FCRA restrictions on obtaining consumer information for such purposes under section 1681b.[11]

In short, the Ninth Circuit's redefinition of the term "willfully" in section 1681n will affect a vast array of entities and all of FCRA's numerous requirements, and hence amply justifies review by the Court.

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[9] See FTC Staff Letter from William Haynes to Matthew B. Halpern (June 11, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/halpern.htm.

[10] See *Yang v. GEICO*, 146 F.3d 1320 (11th Cir. 1998).

[11] See, *e.g.*, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006); *Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053 (N.D. Cal. 2006); *Pearson v. Novastar Home Mortgage, Inc.*, No. 05-1377-A, 2006 U.S. Dist. LEXIS 36282 (M.D. La. Mar. 28, 2006).

II. THE NINTH CIRCUIT'S DIVERGENT AND ERRONEOUS DECISION WILL CAUSE PROBLEMS ACROSS THE BROAD SWEEP OF ITS IMPACT

The Ninth Circuit's decision will not just sweep broadly; it will cut deep. It will, with respect to the Act's unresolved issues, promote forum shopping, skew and complicate compliance, and undermine the attorney-client privilege. Those impacts will be particularly pronounced because FCRA is, in fact, a complicated statute that presents many unresolved issues. And this pronounced effect is especially problematic because, as Congress found, the flow of consumer information is critical to the American economy, including the housing market—which is why the Act strikes a balance between business and consumer interests that the Ninth Circuit's ruling threatens to upset.

A. The Circuit Split Created by the Ninth Circuit Will Result in Forum Shopping and More Litigation, Skew Compliance, and Undermine the Attorney-Client Privilege

As noted above, mortgage insurers provide insurance on millions of mortgages nationwide. Absent prompt correction, the Ninth Circuit's acknowledged refusal to adopt the interpretation of FCRA reached by other Circuits will lead to extensive forum shopping and increased class action filings and will adversely affect efforts to comply with the statute.

The decision below threatens to make district courts in the Ninth Circuit the forums of choice for FCRA nationwide class actions. The ability to pursue claims for statutory and punitive damages dramatically increases the potential damages under FCRA; indeed, unlike other federal statutes such as the Truth in Lending Act and the Fair Debt Collection Practices Act, FCRA does not cap a defendant's liability in class actions. As such, the ruling below, by creating a lessened standard of proof for "willful" violations, will di-

rectly drive the calculus as to where plaintiffs will file suit. Because mortgage insurers carry out their activities on a nationwide basis, plaintiffs will have the opportunity to try to file their FCRA class action cases in the Ninth Circuit, thus avoiding the other circuit court decisions that apply a sensible reading of the key statutory term. Indeed, starting immediately after the Ninth Circuit's initial opinion, numerous FCRA class actions have been filed in the Ninth Circuit—including by residents of far-off jurisdictions such as Georgia and Tennessee.[12] Allowing the conflict created by the decision below to persist thus would give a green light to massive forum shopping. Moreover, by lowering the standard for statutory and punitive damages, the decision below likely will lead to a sharp increase in filing of new FCRA class actions, thereby raising costs and increasing artificial settlement pressures.

The ruling below will also skew the efforts of mortgage insurers to comply with FCRA, raising costs and discouraging the beneficial use of consumer information. As Congress has emphasized, FCRA "seeks to balance the needs of consumers and businesses" with respect to the use of consumer information. S. Rep. No. 103-209, at 2 (1993).[13]

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[12] See *Luther v. 1-800-BAR-NONE*, No. 05 c 4026 (N.D. Cal. Oct. 5, 2005); *Hogan v. PMI Mortgage Ins. Corp.*, No. C05-3851 PJH (N.D. Cal. Sept. 23, 2005); *Holloway v. Homefield Fin. Inc.*, No. SACV 05-0861 (C.D. Cal. Sept. 6, 2005); *Phillips v. Accredited Home Lenders Holding Co.*, No. SACV 05-851 (C.D. Cal. Sept. 1, 2005); *Yeagley v. Wells Fargo & Co.*, No. C05-3403 CRB (N.D. Cal. Aug. 22, 2005); *Putkowski v. Irwin Home Equity Corp.*, No. C05-3289 PJH (N.D. Cal. Aug. 12, 2005).

[13] See also *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045–46 (7th Cir. 2005) (FCRA is an "attempt to achieve this balance between consumer privacy and the needs of a modern, credit-driven economy"); *Ladner v. Equifax Credit Info. Servs., Inc.*, 828 F. Supp. 427, 429 (S.D. Miss. 1993) (FCRA "legislat[es] a balance between the interest of the consumer public and that of financial institutions").

Given the severity of a potential class-action award of statutory and punitive damages if a company's position on an unresolved issue is determined in hindsight to have been "implausible," mortgage insurers, like other companies, will be pressured by the ruling to consider adopting an unnecessarily conservative reading of each of the Act's various requirements. Indeed, the Ninth Circuit's ruling will impose particular burdens on companies with nationwide or multistate operations, like MICA's members, because of the risk from nationwide class actions filed in the Ninth Circuit. It will be cold comfort to such businesses that other Circuits have held that statutory and punitive damages can be awarded only for knowing noncompliance with the Act's requirements. The fact that the Ninth Circuit's decision not only conflicts with, but as a practical matter will *nullify*, the rulings of other appellate courts underscores the urgent need for review by this Court.

Finally, the ruling below will undermine the attorney-client privilege and, in doing so, will weaken rather than enhance compliance with the Act's substantive requirements. As the Ninth Circuit unabashedly acknowledged, its "reckless disregard" standard will routinely put at issue "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." 435 F.3d at 1099. Indeed, given the risk of catastrophic statutory and punitive damages in nationwide class action cases, mortgage insurers and other defendants may, as a practical matter, feel it necessary to disclose the privileged advice they received in an effort to defend themselves. As such, the Ninth Circuit's approach contravenes the strong public interest in protecting attorney-client communications. See, *e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Moreover, by putting such advice routinely at issue, the ruling below will discourage clients from seeking, and lawyers from providing, frank and thoughtful advice with respect to FCRA compliance—lest such advice later be used against the

client as proof of the kind of "creative lawyering" that, under the Ninth Circuit's approach, justifies the imposition of exemplary damages on a defendant. Thus, rather than motivating companies to "seek objective answers from their counsel as to the true meaning of the statute" (435 F.3d at 1099), the decision below will undermine forthright legal advice and true compliance with the Act. Last, still further problems will arise from the Ninth Circuit's assertion (*id.*) that consultation with attorneys and reliance on their advice may not be sufficient to avoid a finding of willfulness if a court concludes in hindsight that the lawyers provided "indefensible answers." That holding places clients in the impossible situation of having to second-guess their attorneys—still further undermining both the privilege and compliance. It can safely be said that Congress never intended such an approach when it enacted section 1681n.

B. These Adverse Effects Will Be Particularly Pronounced Because FCRA Is a Complex Statute that Raises many Unresolved Issues

The Ninth Circuit's holding that a defendant can be held to have acted "willfully" if an appellate court finds its position on an unresolved FCRA issue be "implausible" will have a particularly powerful impact because FCRA is a complicated statute as to which industry has been given little regulatory guidance and which raises many still-unresolved issues.

FCRA is a "complex statutory scheme." *Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003). For example, as directly applicable to these cases, the term "adverse action" is given five separate meanings by the Act. 15 U.S.C. § 1681a(k). There is, moreover, relatively little guidance as to the proper interpretation or application of the Act's complicated provisions. The FTC, which has jurisdiction over certain of the Act's provisions, has no general authority to issue substantive rules under the Act (see 15 U.S.C.

§ 1681s(a)(1); 65 Fed. Reg. 80,802, 80,803 (Dec. 22, 2000)) and, since 2001, has not even issued informal interpretive letters (see http://www.ftc.gov/os/statutes/fcrajump.htm). Indeed, three years ago, Congress enacted the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, a lengthy statute that revised many of FCRA's existing provisions and added numerous new statutory terms, but many of the regulations that Congress required for implementing these new provisions have yet to be issued.

Not surprisingly, given the Act's complexity and limited guidance, numerous issues concerning the Act's interpretation and application remain unresolved. In the instant cases, for example, the Ninth Circuit considered, admittedly as a "matter of first impression," whether an initial insurance premium charge is properly considered an "increase in any charge" and hence can constitute an "adverse action." 435 F.3d at 1090. In ruling that it is, moreover, the court rejected multiple prior district court rulings, including in the case on appeal.[14] The Ninth Circuit also considered, again for the first time, whether an "adverse action" can have occurred when the use of credit information resulted in the consumer receiving a better rate than if credit information has not been considered at all. On this new issue, too, the appeals court rejected the district court's ruling. 435 F.3d at 1092–93.

Similarly, issues relating specifically to the Act's application to mortgage insurance remain unresolved under FCRA. For example, the duties that apply in the event of an "adverse action" depend in part on which of the five prongs of the Act's "adverse action" definition applies. 15 U.S.C. § 1681a(k). Mortgage insurance arises as part of a credit transaction: when a prospective homeowner seeks credit in the form of a mortgage, the lender as part of that credit transaction obtains mortgage insurance in order to insure against

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[14] See, *e.g.*, *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003).

the risk it would face if the borrower defaults on a loan and the value of the collateral is insufficient to pay the amount of the outstanding indebtedness. Because mortgage insurance, thus, is an integral part of a transaction in which a consumer is obtaining credit, MICA believes that the so-called "credit" prong applies. *Id.* § 1681a(k)(1)(A). Advocates in cases against MICA's members have argued, however, that the definition of adverse action applicable to the "underwriting of insurance" instead applies. *Id.* § 1681a(k)(1)(B)(i). This unresolved question is crucial; if the credit transaction definition applies, a mortgage insurer is not required to send adverse action notices in circumstances where the consumer obtains the product (a loan) that he or she sought. See 16 C.F.R. pt. 698, app. H, § I.C ("No adverse action occurs in a credit transaction where the creditor makes a counteroffer that is accepted by the consumer.").

Another area of uncertainty concerns whether adverse action notice requirements even apply to mortgage insurers. A federal district court has ruled that mortgage insurers have no duty to send adverse action notices to consumers because mortgage insurers contract with lenders, not consumers, and because they insure lenders' risks, not consumers' risks. *Whitfield v. Radian Guar., Inc.*, 395 F. Supp. 2d 234 (E.D. Pa. 2005), *appeal pending*, No. 05-5017 (3d Cir.). An older, non-binding FTC staff letter disagrees. FTC Staff Letter from Clarke W. Brinckerhoff to Paul H. Schieber at n.1 (Mar. 3, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/schieber.htm.

In short, the Ninth Circuit's adoption of a standard that invites an award of massive statutory and punitive damages for wrong answers to open FCRA issues is particularly pernicious because there are so many open issues under the Act. Immediate correction of that standard is therefore all the more important.

C. These Pronounced Adverse Effects Are Especially Problematic Because the Efficient Flow of Consumer Information Is Vital to the Economy, Including the Housing Industry

The recent widespread advances in technology have dramatically affected the consumer reporting industry.[15] Because of the computerization of records, development of the internet, and ability to transmit data electronically, entities that maintain information about consumer accounts now are able to quickly provide reporting agencies with considerable amounts of information, and entities whose operations are enhanced through the use of consumer information now are able to access it on a timely basis.[16]

This flow of consumer information is vital to the United States economy. In passing FCRA, Congress found that our "banking system is dependent upon fair and accurate credit reporting." 15 U.S.C. § 1681(a)(1). It further found that consumer reporting agencies "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." *Id.* § 1681(a)(3). Indeed, this Court has found that "Congress enacted the FCRA in 1970 to," *inter alia*, "promote efficiency in the Nation's banking system * * *." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

FCRA facilitates and encourages the efficient flow of consumer information in multiple ways. Congress authorized disclosure by consumer reporting agencies of consumer

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[15] S. Rep. No. 104-185, at 18 (1995) ("the credit reporting industry has grown in the wake of information technology advances that have occurred over the last twenty years").

[16] Robert B. Avery et al., An Overview of Consumer Data and Credit Reporting, Federal Reserve Bulletin, at 49 (Feb. 2003), *available at* http://www.federalreserve.gov/pubs/bulletin/2003/0203lead.pdf (estimating that each consumer reporting agency receives more than two billion items of information each month).

information to various public and private entities in numerous circumstances. 15 U.S.C. § 1681b. It directed companies that maintain information about consumer accounts to furnish such information to consumer reporting agencies in an accurate manner. *Id.* § 1681s-2. Congress also preempted state laws that interfere with FCRA's key provisions. *Id.* § 1681t(b).

The nationwide system created by Congress provides considerable benefits to business and consumers alike. The FTC has noted that "[t]his flow of information [permitted under FCRA] enables credit grantors and others to make more expeditious and accurate decisions, to the benefit of consumers."[17] Among the benefits conferred by the efficient sharing of consumer information are rapid qualification for mortgage, automobile, and retail credit; higher levels of home ownership; more accurate pricing of credit based on risk; and increased availability of non-mortgage credit for low-income households.[18] According to Congress, these benefits have saved consumers as much as $100 billion annually.[19]

In sum, by establishing a standard for punitive damages that will adversely effect the efficient flow of consumer information on a nationwide basis, the Ninth Circuit's ruling undermines Congress's goal of promoting the efficient flow of such information in order to enhance the economy, including the promotion of homeownership. As shown above, FCRA seeks to balance consumer and business interests in the use of consumer information, and the Ninth Circuit's

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[17] Federal Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, at 1 (Dec. 2004), *available at* http://www.ftc.gov/reports/facta/041209factrpt.pdf.

[18] H.R. Rep. No. 108-263, at 23 (2003).

[19] *Id.*

opinion threatens to upend that careful balance. The petitions for review should therefore be granted.

III. THE NINTH CIRCUIT'S ERRONEOUS "ADVERSE ACTION" RULINGS FURTHER WARRANT REVIEW

The need for review is even greater in light of the Ninth Circuit's erroneous reading of the Act's critical adverse action provisions, which will exacerbate the problems described above. First, the Ninth Circuit's conjured requirement that an adverse action notice must "describe the action" taken, "specify the effect of the action upon the consumer," and "identify the party or parties taking the action" (435 F.3d at 1095) is not just unsupported by the statutory text, it will also cause serious practical problems. In the mortgage insurance context, the *lender* decides whether mortgage insurance is needed, the amount of the insurance, whether and to what extent the borrower will be asked to pay the premium, and, in some instances, the rate at which the policy will be issued. Describing the action taken, and the effect on the consumer, in these circumstances could require a complex recitation about the nature of mortgage insurance, the relationship between the lender and the mortgage insurer, and the various mortgage insurance plans that MICA's members offer to mortgage lenders, in order to comply with the Ninth Circuit's new, vague directive. Separately, confusion will likely result if a consumer who has successfully obtained a mortgage loan is simultaneously told that he or she experienced "adverse" action and receives that notice from an entity (the mortgage insurer) with whom he or she has had no dealings of any kind.

Likewise, the Ninth Circuit's holding that adverse action occurs under section 1681m when "because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged" (435 F.3d at 1092) misconstrues the Act's plain language. If there was no

earlier charge, there simply cannot be said to have been "an increase in any charge" (15 U.S.C. § 1681a(k)(1)(B)(i)), and hence there is no adverse action. Likewise, where no credit information has been found, the subsequent pricing decision simply cannot be said to have been "based in whole or in part on any information contained in a consumer report" (*id.* § 1681m(a)), and hence no duties are triggered.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

THOMAS M. HEFFERON
Counsel of Record
RICHARD M. WYNER
JOSEPH F. YENOUSKAS
GOODWIN | PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
Tel: 202-346-4000

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IN THE

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HARTFORD FIRE INSURANCE COMPANY,
Petitioner,

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,
Petitioners,

GEICO GENERAL INSURANCE COMPANY, *et al.*,
Petitioners,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

JASON JAY REYNOLDS,
Respondent,

CHARLES BURR, *et al.*,
Respondents,

AJENE EDO,
Respondent,

JULIE WILLES,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SUSAN M. POPIK
Counsel of Record
MERRI A. BALDWIN
CHAPMAN, POPIK & WHITE LLP
650 California Street, 19th Floor
San Francisco, California 94108
(415) 352-3000
Attorneys for Amicus Curiae

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Property Casualty Insurers Association of America ("PCI") respectfully submits this *amicus curiae* brief in support of the petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit filed by Hartford Fire Insurance Company; GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company; Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon; and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively "petitioners").[1]

INTEREST OF *AMICUS CURIAE*

PCI is a trade group dedicated to representing its member companies' interests before governmental bodies and state and federal courts. PCI's members include more than 1,000 property and casualty insurance companies that together account for $184 billion in direct written premiums, including 52% of all personal auto premiums and 39.6% of all homeowners premiums written in the United States.

PCI is familiar with the issues involved in this case, including the issues raised in petitioners' petitions for writs of certiorari. As those petitions demonstrate, this case presents several issues of first impression relating to the interpretation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, each of which is of critical importance to PCI's members and to the insurance industry as a whole. PCI and its member companies thus have a substantial interest in the outcome of the present action.

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1. No counsel for any party authored this *amicus* brief in whole or in part, and no person or entity other than PCI made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this *amicus* brief, and their letters are on file with the Clerk of this Court.

In PCI's view, one aspect of the Ninth Circuit's opinion in particular bears further briefing: the required contents of a valid adverse action notice under 15 U.S.C. § 1681m. PCI believes its *amicus* brief will be helpful to the Court in offering a somewhat different approach to this issue than do the parties' petitions and in providing data that underscore the significant negative consequences to the insurance industry and the insurance-buying public if the Ninth Circuit's opinion is allowed to stand.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion fashions entirely new content requirements for adverse action notices that threaten the very solvency of the insurance industry. These unprecedented requirements are unsupported by any authority and conflict with both the express language of 15 U.S.C. § 1681m ("section 1681m") and with Federal Trade Commission directives written for the express purpose of advising insurers of their obligations under FCRA. These new notice requirements are vague in their scope and application and, given the realities of modern insurance underwriting practices, may be virtually impossible for insurers to meet.

The detailed notice requirements adopted by the Ninth Circuit will also thwart one of Congress's primary objectives in enacting FCRA, which is to provide consumers with clear, intelligible information concerning their credit reports. Combined with the court's expansive definition of "willfulness," imposition of these requirements threatens the insurance industry with potentially ruinous penalties and the prospect of continued litigation. For all these reasons, petitioners' requested writs of certiorari should issue.

ARGUMENT

A. The Decision Below Seriously Threatens the Continued Availability and Affordability of Personal Lines Insurance.

According to the Ninth Circuit's opinion, in order to comply with section 1681m, an adverse action notice must, "at a minimum, . . . communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action." *Reynolds v. Harford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1095 (9th Cir. 2006); *see id.* at 1100. As will be discussed further below, these hitherto unknown requirements conflict with the express language of the statute, run afoul of the dictates of prior case law, and are patently inconsistent with Federal Trade Commission advisory directives written specifically to inform insurers of their obligations under FCRA. If upheld, these requirements could have a potentially devastating impact on the insurance industry, since insurers have for years sent out notices that could be construed to fall short of the Ninth Circuit's newly-minted requirements. In light of the broad standard of "willfulness" adopted by the court (discussed further below), such a construction could subject many insurers to statutory liabilities of staggering proportions.

According to industry data, it is estimated that, in 2005, the number of personal lines policies subject to credit scoring (including both new business and renewals) exceeded 71.5 million.[2] While there are no data stating how many adverse

2. This figure was derived using public information, beginning with the latest personal auto and homeowners exposure counts from the National Association of Insurance Commissioners for those states (Cont'd)

action notices insurers sent during this same time period, it may conservatively be assumed that approximately 50% of these policies triggered such notices.[3] Based on these assumptions, insurers sent some 35.7 million adverse action

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(Cont'd)

where credit information is allowed. Because each insured automobile constitutes an "exposure," even though more than one auto may be insured on a single policy, the total number of "exposures" was extrapolated and converted into policy counts using data from the Federal Highway Administration and the U.S. Census Bureau. The total policy counts (176.4 million) were then reduced to include only those policies for which credit history was examined. The factors used to generate the final numbers and their sources are as follows:

- Proportion of companies known to use insurance scoring - Michigan Office of Financial and Insurance Services;
- Percentage of the largest auto companies using credit scoring models - Conning & Company;
- Percentage of companies using credit data on new business - Conning & Company;
- Retention ratios (applied to develop breakdown between new business and policy renewals) - Ward Financial Group; and
- Frequency with which renewal policy counts are subject to credit (three years) - National Conference of Insurance Legislators' Model Act Regarding Use of Credit Information in Personal Insurance

These percentages and ratios were then applied to the total policy counts to determine the estimated new and renewal policies affected by the use of credit-based insurance scoring.

3. These percentages obscure the fact that, generally speaking, the use of credit information and other consumer reports enables carriers to charge *lower* rates overall than would otherwise be the case. Thus, a carrier's actions in an individual case might trigger an adverse action notice (e.g., where the applicant's credit standing results in an "increased" premium), even though the applicant is paying less than if the carrier had calculated the premium using a different set of factors that did not include credit information.

notices in 2005 alone, *not* including those sent when an application is denied. Assuming, as it is reasonable to do, that similar numbers of adverse action notices were sent in each of the past five years, carriers have sent approximately 178.5 million adverse action notices since 2001 – many of which could conceivably be vulnerable to *ex post facto* scrutiny based on the Ninth Circuit's new notice requirements.

FCRA provides for statutory damages of between $100 and $1000 per willful violation. 15 U.S.C. § 1681n(a). The Ninth Circuit's overreaching interpretation of FCRA's notice requirements thus potentially exposes the insurance industry to statutory damages alone (not including punitive damages) that could threaten the solvency of many insurers and negatively affect the continued availability and affordability of personal lines insurance. Even without more, but especially in light of these potentially devastating consequences, the Ninth Circuit's erroneous and unsupported interpretation of FCRA's notice requirements warrants this Court's plenary review.

B. The "Minimum Requirements" for a Valid Adverse Action Notice Announced by the Ninth Circuit Are Not Supported by the Statutory Language and Are Inconsistent with the Governing Agency's Interpretation of the Statute.

1. The Ninth Circuit's Interpretation of Section 1681m Conflicts with the Statutory Language and Has No Support in the Case Law.

The purposes of FCRA, and of its notice requirement, are twofold: "to safeguard against the improper reporting of information on a credit report (either by the credit reporting agency or by the furnisher of credit information)" and to guard against "the improper disclosure of a credit report."

Myers v. Bennett Law Offices, 238 F.3d 1068, 1074 (9th Cir. 2001); *see* 15 U.S.C. § 1681(b) (noting that one of FCRA's purposes is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information").

In aid of this goal, section 1681m of the Act sets forth requirements for users of consumer reports, and provides that any person who takes adverse action based in whole or in part on information contained in a "consumer report"[4] shall provide three specific types of information to the consumer, in "oral, written, or electronic" form: (1) notice of the adverse action; (2) contact information for the consumer reporting agency (together with a statement that the agency did not make the decision to take the adverse action and cannot provide information concerning the action); and (3) notice of the consumer's right to obtain a copy of the consumer report and to dispute the accuracy or completeness of any information in the report.[5] 15 U.S.C. § 1681m.

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4. The Act broadly defines "consumer report" as any communication by a consumer reporting agency "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used . . . as a factor in determining the consumer's eligibility for," among other things, "insurance . . . to be used primarily for personal, family, or household purposes[.]" 15 U.S.C. § 1681a(d)(1).

5. Section 1681m(a) provides:

> If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall–

(Cont'd)

In considering whether the adverse action notices at issue here met these requirements, the Ninth Circuit went well beyond the mandate of the statute. Rather, as noted above, the court concluded that a valid notice must, "at a minimum," specifically state that an adverse action was taken; "describe" the action; "specify the effect" of the action on the consumer; and identify the party or parties taking the action. *Reynolds*,

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(Cont'd)

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically–

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right–

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

435 F.3d 1095; *see id.* at 1100. None of these content requirements is found in section 1681m itself, and none can fairly be implied from the language of the statute.

In support of its holding, the Ninth Circuit cited only *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir. 1983), a case that has virtually nothing to do with the issues involved here. In that case, Fischl applied for credit to finance the bulk of the purchase price of an automobile. The credit application was referred to General Motors Acceptance Corp. ("GMAC"), which obtained a consumer report on Fischl. After reviewing the application and consumer report, GMAC determined that credit should not be extended. It then sent Fischl a form letter advising him that his application had been rejected on the ground that "credit references are insufficient." In the portion of the letter designed to disclose the use of information from outside sources, GMAC marked "disclosure inapplicable." *Id.* at 145. Fischl subsequently learned that GMAC had in fact obtained his credit information and filed suit under FCRA.

Not surprisingly, the Fifth Circuit held that GMAC's purported notice failed to comply with section 1681m, since it misleadingly stated "disclosure inapplicable" instead of informing Fischl that GMAC had in fact relied on a consumer report in denying Fischl's loan application. *Id.* at 150. But that is all the *Fischl* opinion says: Other than to make plain that an adverse action notice cannot contain untrue information, the case does not even address the required content of such a notice – much less hold that such a notice is invalid unless it contains the specific and detailed information required by the Ninth Circuit. Indeed, other than the Ninth Circuit here, no court in the country has ever interpreted section 1681m to impose any such requirements.

2. The Ninth Circuit's Interpretation of Section 1681m Conflicts with That of the Federal Trade Commission, the Agency Charged with Enforcing FCRA.

In accord with both the express statutory language and common sense, the Federal Trade Commission – the agency primarily responsible for enforcing the FCRA (*see* 15 U.S.C. § 1681s(a); *Fischl*, 708 F.2d at 149 n.4) – has specifically addressed what information an insurer must provide a consumer in an adverse action notice. In stark contrast to the Ninth Circuit's interpretation, both the FTC's regulations and its advisory materials essentially track the express language of the statute and state that, to be effective, an insurer's adverse action notice need only include "the name, address, and telephone number" of the agency supplying the report; "a statement that the credit reporting agency that supplied the report did not make the decision to take its adverse action"; and a notice of the consumer's right to dispute the information.[6] *See* 16 C.F.R. Part 601, App. C.; "FTC Facts

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6. In *Fischl*, the Fifth Circuit summarized the FTC's role in interpreting FCRA as follows:

> Although it does not possess substantive rule-making power, the FTC is authorized to enforce the FCRA, "except to the extent that enforcement . . . is specifically committed to some other government agency under [§ 1681s(b)]. . . ." §15 U.S.C. 1681s(a). . . . Due to the absence of express statutory authority to issue binding interpretations of the FCRA, which effectively deprives any such interpretation of the force of law, opinions disseminated by the FTC, whether in the form of its compliance manual or unofficial staff letters, are intended only to clarify the FCRA and are advisory in nature. *These opinions may nonetheless offer helpful guidance to the courts.*

708 F.2d at 149 n.4 (emphasis added).

for Business: Consumer Reports – What Insurers Need to Know" (FTC October 1998) (reproduced at PCI's Appendix ("PCI App.") at App. B); *see also* FTC Staff Opinion Letter, dated November 10, 1998, PCI App. at App. A (opining that section 615(a) of FCRA requires adverse action notices to contain "only the information specified" in the statute).

Prior to the decision below, no court had ever suggested, much less held, that an adverse action notice must contain the detailed content required by the Ninth Circuit. Nor can such a requirement be gleaned from a fair reading of the FCRA itself. To the contrary, the only source of specific information concerning the "official" interpretation of this aspect of FCRA – the FTC's regulations and the advisory materials written specifically for insurers – detail a much simpler and straightforward response to consumers in the event of adverse action. A writ of certiorari should therefore issue to review and correct the Ninth Circuit's unjustified and erroneous interpretation of section 1681m's notice requirements.

C. The Ninth Circuit's Notice Requirements Do Not Further FCRA's Purposes and Impose an Unreasonable Administrative and Economic Burden on Insurers.

As noted above, the primary goal of section 1681m is "to promote the accuracy of information in a consumer credit report." *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1334 (9th Cir. 1995). The Ninth Circuit's newly imposed "minimum" requirements are of no assistance whatever in achieving that end. To the contrary, and in contrast to the statutory requirements, the Ninth Circuit's requirements will serve only to impose an enormous operational burden on insurers without providing consumers with any additional information necessary to determine if their credit information is accurate and, if not, how to correct it. Take, for example, the Ninth Circuit's requirement that

the notice "specify the effect of the [adverse] action upon the consumer." *Reynolds*, 435 F.3d at 1095. First, this requirement is impermissibly vague in scope and application, since it is impossible to determine what the phrase "specify the effect" means or what level of detail is necessary to satisfy this criterion.[7] Moreover, assuming an insurer could overcome this threshold hurdle, the complexities of modern insurance underwriting are such that many insurers will simply be unable to provide the information apparently required by the Ninth Circuit – or at least to do so in a form that consumers will understand.

To be sure, some insurers may use credit information in such a straightforward way that the "effect" of the adverse action will be easy to discern and explain – such as when an insured's premium rate is increased solely and directly because of information in his or her credit report. More often, however, the role of consumer reports in the rating process is much more complicated and nuanced, having both direct and indirect ramifications. Insurance companies calculate premiums using various underwriting or rating factors. These factors can be affected in numerous ways by information contained in consumer reports. For example, many insurers use consumer report information to calculate an "insurance score," which is then used to place an applicant in a basic risk category or "tier," such as "preferred," "standard," or "nonstandard." Each of these tiers may have associated rating factors and may also, in turn, determine what other rating parameters are applied. Thus, for example, the fact of a speeding violation (information which itself comes from a consumer report) may affect the "preferred" risk tier differently than the "nonstandard" risk tier. Similarly, an applicant's insurance score may affect whether an applicant

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7. Thus, far from providing guidance as to FCRA compliance, the Ninth Circuit's notice requirements threaten to open a Pandora's box of new litigation.

is eligible for certain discounts or surcharges and, if so, the amount of those discounts and surcharges.

This interaction among the various factors that go into the setting of premiums could make it literally impossible for an insurer to "specify the effect" of the "action" taken as a result of information derived from an individual policyholder's consumer reports. The problem is further complicated by the fact that insurers may use information from a number of consumer reports (e.g., credit reports, motor vehicle reports, and others) in setting a premium or determining eligibility for coverage, making any meaningful explanation of the "effect" of the reports virtually impossible. Suppose, for example, a policyholder has "good" credit (as derived from a credit report) and one speeding violation. Through sophisticated statistical techniques, an insurer might be able to derive the *overall* rate impact of these two factors combined, but not be able to separate the impact of the good credit, on the one hand, and the speeding violation, on the other. Just how is the carrier to "specify the effect" of its action in these circumstances?

The end result is that, to satisfy the Ninth Circuit's notice requirements, insurers may be forced to provide consumers with an extremely complicated description of their underwriting practices, corporate structure and business practices. Thus, far from providing clear, intelligible information designed to assist a consumer in determining whether his or her credit information is accurate and to correct it if it is not, the result of the Ninth Circuit's opinion is to impose upon insurers the duty to provide highly complex and detailed disclosures in which the key information contemplated by the statute will be all but lost.

D. The Ninth Circuit's Conclusions on Notice and Willfulness Are Inconsistent with FCRA's Intent and Threaten to Subject the Insurance Industry to Potentially Crippling Penalties.

Violations of FCRA (including the failure to comply with the adverse action notice requirements of section 1681m(a)) subject the users of consumer reports to a variety of civil damages and penalties. "Negligent noncompliance" subjects a user to liability for actual damages sustained by the consumer as a result of the noncompliance, plus court costs and attorney fees in the event of successful litigation. 15 U.S.C. § 1681o(a). If the noncompliance is "willful," the user is additionally liable for statutory damages of between $100 and $1,000 per consumer, as well as for punitive damages. *Id.* § 1681n(a).

As explained by the parties in their petitions, the Ninth Circuit's adoption of a "reckless disregard" standard of willfulness blurs the distinction between negligent and willful conduct and is therefore contrary to this Court's prior holdings.[8] Even were that not so clearly the case, other circuits have concluded – correctly – that the level of culpability required to constitute "willfulness" under FCRA is much higher, reserving its application to situations in which the defendant *knew* the challenged conduct to be unlawful. *See Phillips v. Grendahl*, 312 F.3d 357, 368, 370 (8th Cir. 2002) (noting that "the statute's use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful" and that "willful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law"); *Duncan*

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8. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 129-30 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988), both of which hold that mere negligence does not equal willfulness.

v. Handmaker, 149 F.3d 424, 429 (6th Cir. 1998) ("[I]n order to incur civil liability for operating under false pretenses, a party must act willfully and purposefully 'with a motivation to injure.' [Citation.] This interpretation comports with the language of § 1681n. . . ."). Indeed, the Ninth Circuit specifically acknowledged this split of authority, but opted to follow the "reckless disregard" standard adopted by the Third Circuit in *Cushman v. Trans Union Corp.*, 115 F.3d 220, 229 (3d Cir. 1997).[9] *Reynolds*, 435 F.3d at 1098. On the basis of this conflict alone, the Court should grant the petitions for certiorari.

Beyond this, however, the effect of the Ninth Circuit's erroneous interpretation of the term "willfully" itself warrants review by this Court. If the Ninth Circuit's "reckless disregard" standard were to be applied to all aspects of FCRA compliance, including the content of adverse action notices, major segments of the insurance industry could be subjected to potentially staggering statutory and punitive damages resulting from the routine – and long-approved – use of consumer reports. Given the significant numbers of adverse action notices sent each year, the potential financial penalties are staggering. The alternative is that insurers may be dissuaded from using consumer reports altogether, which would increase the cost of insurance to consumers.

These potential results are far removed from Congress's intent in enacting FCRA, which specifically authorizes the use of consumer reports in the underwriting of insurance. *See* 15 U.S.C. § 1681b. At the same time, the effect of the Ninth Circuit's notice requirements is to seriously disrupt the ability of insurers to do business and, in the final analysis,

9. Although declining to adopt an "actual knowledge" standard, the *Cushman* court was at least careful to point out that, to be actionable as a "willful" violation, the defendant's conduct "must be on the same order as willful concealments or misrepresentations." 115 F.3d at 227. The Ninth Circuit has not similarly qualified its holding.

to harm the very consumers that FCRA was enacted to protect. On this ground as well, this Court should grant the petitions for certiorari to review the Ninth Circuit's ill-considered opinion.

CONCLUSION

For all the reasons discussed above and in the parties' petitions, a writ of certiorari should issue to review the opinion and judgment of the Ninth Circuit below.

Respectfully submitted,

SUSAN M. POPIK
Counsel of Record
MERRI A. BALDWIN
CHAPMAN, POPIK & WHITE LLP
650 California Street, 19th Floor
San Francisco, California 94108
(415) 352-3000

Attorneys for Amicus Curiae

APPENDIX

APPENDIX A — FTC STAFF OPINION LETTER, DATED NOVEMBER 10, 1998

Federal Trade Commission (F.T.C.)
Division of Financial Practices

Fair Credit Reporting Act

Staff Opinion Letter

November 10, 1998

Mr. Ronald L. Sheffield

Special Assistant Commissioner, Consumer Affairs

Arkansas Insurance Department

1200 West Third Street

Little Rock, AR 72201-1904

Dear Mr. Sheffield:

This will respond to your letter inquiring about the applicability of the Fair Credit Reporting Act ("FCRA") to an insurance company's denial of insurance to an applicant based on information contained in a consumer report. You ask two specific questions: (1) does the FCRA require an insurance company to disclose to an applicant what specific information in the credit report was relied on in denying insurance to that applicant; (2) if not, would the insurance company violate the FCRA by voluntarily disclosing such information to the applicant. The answer is "no" to both questions.

Section 615(a) of the FCRA sets forth the information that must be disclosed to a consumer by any person taking adverse

action[1] with respect to that consumer based in whole or in part on any information contained in a consumer report. That section requires disclosure of only the information specified, namely:

1. Notice (either oral, written, or electronic) of the adverse action;

2. The name, address, and telephone number of the consumer reporting agency ("CRA") from whom the report was obtained. If the CRA compiles and maintains files on consumers on a nationwide basis, the person must disclose a toll-free number for the CRA, which the CRA is required to establish;

3. A statement that the CRA did not make the decision to take the adverse action and is unable to provide the specific reasons why the action was taken; and

4. Notice of the consumer's right to obtain a free copy of his or her consumer report from the CRA and to dispute the accuracy or completeness of any information in a consumer report furnished by the CRA.

The FCRA does not require insurers to disclose specific reason(s) for taking adverse action, or to identify information from a consumer report that contributed to the action. Instead, it provides the consumer with the right to obtain a copy of all the information in his or her CRA files. From the required notice (item #4, above), consumers who suffer adverse action will know of their right to obtain that data without charge. However, should

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1. With respect to the underwriting of insurance, Section 603(k)(1)(B)(i) of the FCRA defines "adverse action" to mean "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

an insurer or other person wish to tell a consumer the reason(s) for the adverse action, nothing in the FCRA precludes that person from doing so.[2]

This is an informal staff opinion and is not binding on the Commission.

Sincerely,

Ronald G. Isaac

Attorney

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2. Section 607(c) forbids CRAs from prohibiting insurers or other consumer report users from providing consumers against whom they have taken adverse action with copies of their reports.

APPENDIX B — "FTC FACTS FOR BUSINESS: CONSUMER REPORTS – WHAT INSURERS NEED TO KNOW" (FTC OCTOBER 1998)

As an insurer, you may use consumer reports to underwrite insurance policies and to screen high-risk applicants — as long as you comply with the Fair Credit Reporting Act (FCRA).

The Act

The FCRA is designed to protect the privacy of consumer report information and to guarantee that the information supplied by credit reporting agencies (CRAs) is as accurate as possible. Consumer reports may include information on an applicant's credit history, medical conditions, driving record, criminal activity, and hazardous sports. Amendments to the FCRA, which went into effect September 30, 1997, increase the legal obligations of insurers who use consumer reports.

Appendix B

Non-compliance with the FCRA

There are legal consequences for insurers who fail to get an applicant's permission before requesting a consumer report or who fail to provide required disclosure notices. The FCRA allows individuals to sue insurers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue insurers for non-compliance and obtain civil penalties.

For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft, and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

Appendix B

The Adverse Action Notice

The following disclosure requirement applies to new applicants as well as current policy holders. When an adverse action is taken—such as a decision to deny insurance, increase rates, or terminate a policy—and it is based solely or partly on information in a consumer report, Section 615(a) of the FCRA requires you to provide a notice of the adverse action to the consumer. The notice must include:

- ✓ the name, address, and telephone number of the CRA that supplied the consumer report, including the toll-free telephone number for credit bureaus that maintain files nationwide;
- ✓ a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give the specific reasons for it; and
- ✓ a notice of the individual's right to dispute the accuracy or completeness of any information the CRA furnished, and the consumer's right to a free report from the CRA upon request within 60 days.

Disclosure of this information is important because some consumer reports may contain errors. The adverse action notice is required even if information in the consumer report was not the main reason for the denial or rate increase. Even if the information in the report played only a small part in the overall decision, the applicant still must be notified.

While written adverse action notices are not required, many insurers provide them and keep copies for two years to show compliance with the FCRA.

Examples

The following examples illustrate situations where the adverse action notice must be given to insurance applicants.

> *A life insurance company orders a consumer report from a CRA, such as the Medical Information Bureau (MIB). Information contained in the MIB report leads to further investigation of the applicant. The application for insurance is rated or declined in whole or in part because of information obtained from the investigation.*

Section 604(g) of the FCRA requires an insurance company, or any other user of medical information, to get the consumer's consent — orally, electronically, or in writing — before obtaining medical information. That means the life insurance company in this situation would have to get the consumer's consent before obtaining the consumer report from the MIB. In addition, since the MIB report formed part of the basis for the adverse decision in this case, the full Section 615(a) adverse action notice described above must be sent to the consumer.

> *A person with an unfavorable credit history, such as a bankruptcy, is denied automobile insurance at standard rates. Although the credit history was considered in the decision, the applicant's limited driving experience was even more important.*

The applicant is entitled to the Section 615(a) adverse action notice because the credit report played a part, however minor, in the insurer's decision to charge a higher premium.

Supreme Court, U.S.
FILED
NOV 13 2006
OFFICE OF THE CLERK

No. 06-100

IN THE
Supreme Court of the United States

GEICO GENERAL INSURANCE COMPANY, GEICO INDEMNITY COMPANY, and GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Petitioners,

v.

AJENE EDO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

Counsel for Petitioners

Maureen E. Mahoney
Counsel of Record
Richard P. Bress
Eric S. Volkman
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Respondent

Scott A. Shorr
Counsel of Record
N. Robert Stoll
Steve D. Larson
Stoll Stoll Berne Lokting & Schlachter PC
209 Southwest Oak Street
Suite 500
Portland, OR 97204
(503)-227-1600

Additional Counsel Listed on Inside Cover

PETITION FOR CERTIORARI FILED JULY 19, 2006
CERTIORARI GRANTED SEPTEMBER 26, 2006

Additional Counsel for Petitioners

Robert D. Allen
Meloney Cargil Perry
Jay F. Utley
Brandon P. Long
Baker & McKenzie LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201
(214) 978-3000

Additional Counsel for Respondent

Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

JOINT APPENDIX

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Plaintiff's Third Amended Complaint for Violation of Fair Credit Reporting Act (May 14, 2003) (ER[1] -001-005) JA-9

Defendants' Answer to Plaintiff's Third Amended Complaint for Violation of Fair Credit Reporting Act (May 23, 2003) (DE[2] 69) JA-13

Affidavit of Paul Lavrey, Corporate Representative, in Support of Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment (Exhibit B to Affidavit of Meloney Cargil Perry in Support of Defendants' Renewed Motion for Summary Judgment) (Oct. 1, 2003) (ER-051-057) JA-18

Concise Statement of Material Facts in Support of Defendants' Renewed Motion for Summary Judgment (Oct. 3, 2003) (ER-008-014) JA-24

Plaintiff's Response to Defendants' Concise Statement

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[1] "ER" refers to the Excerpts of Record

[2] "DE" refers to the docket entry numbering used in the United States District Court for the District of Oregon.

of Material Facts in Support of Defendants' Renewed Motion for Summary Judgment (Oct. 31, 2003) (ER-087-095) JA-30

Certain exhibits to Affidavit of Mark A. Friel in Support of Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment (Oct. 31, 2003):

Exhibit 1, Deposition of Paul Lavrey (March 17, 2003) (excerpts) (ER-101-105, 120-122, 127-137, 142, 148-149) JA-38

Exhibit 3, Letter from GEICO Companies to Oregon Department of Consumer and Business Services with Credit Scoring Procedure attached (Aug. 3, 1999) (excerpts) (ER-157-158, 162-166) JA-52

Exhibit 5, Affidavit of Paul Lavrey (March 13, 2003) (excerpts) (ER-201-206) JA-63

Exhibit 6, 2002 Credit Report Underwriting Questionnaire (excerpts) (ER-208-210, 211, 218-219) JA-69

Exhibit 7, Defendants' Supplemental Response to Plaintiffs' Interrogatory No. 6 (April 28, 2003) (ER-220-221) JA-80

Concise Statement of Material Facts in Support of Defendants' Reply to Plaintiff's Response to Defendants' Renewed Motion for Summary Judgment (Nov. 21, 2003) (ER-0230-240) JA-82

RELEVANT DOCKET ENTRIES
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 04-35279

7/27/04	Filed UNDER SEAL original and 15 copies Appellant Ajene Edo's opening brief (Informal: n) 48 pages and five excerpts of record in 1 vol.; served on 7/23/04 (BRIEFS & EXCERPTS FILED UNDER SEAL) [04-35279] (hh) [04-35279]
	* * *
9/17/04	Filed UNDER SEAL original and 15 copies appellees Geico General Insurance Co., et al., 59 pages brief, and 5 supp'l excerpts in 1 vol. (BRIEFS AND SUPP'L EXCERPTS FILED UNDER SEAL); served on 9/13/04 [04-35279] (hh) [04-35279]
	* * *
10/18/04	Filed UNDER SEAL original and 15 copies Ajene Edo's reply brief, (Informal: n) 24 pages; served on 10/14/04 [04-35279] (hh) [04-35279]
	* * *
3/8/05	ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Marsha S. BERZON, Jay S. BYBEE [03-35695, 03-35848, 04-35279, 04-35313] (dr) [03-35695 03-35848 04-35279 04-35313]
	* * *

8/4/05	FILED OPINION: REVERSED REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Stephen R. REINHARDT, author; Marsha S. BERZON; Jay S. BYBEE, dissenting partially.) FILED AND ENTERED JUDGMENT. [03-35695, 04-35279] (gar) [03-35695 04-35279]

* * *

9/1/05	[5549974] Filed original and 50 copies Appellees Geico General Ins., et al., petition for panel rehearing and rehearing en banc, 18 p.pages, served on 8/31/05 (PANEL, ALL ACTIVE JUDGES AND INTERESTED SENIOR JUDGES) [04-35279] (hh) [04-35279]

* * *

10/3/05	OPINION FILED (Stephen R. REINHARDT, Marsha S. BERZON, Jay S. BYBEE,): REVERSED REMANDED. Order: the opinion and dissent filed on 8/4/05 CITE, is withdrawn. It may not be cites as precedent by or to this ct or any dc in the 9th Cir. The clerk shall file the attached opinion and dissent in its place. [03-35695, 04-35279] (gar) [03-35695 04-35279]

* * *

10/24/05	Filed order and amended opinion (Judges Stephen R. REINHARDT, Marsha S. BERZON, Jay S. BYBEE) The majority opn filed 10/3/05, slip op. 13753, is hereby amended as follows: At slip op 13770, footnote 7, replace "The related cases are resolved by memoranda of disposition filed concurrently herewith," with "The related cases are resolved by memorandum dispositions filed separately." [03-35695, 04-35279] (crw) [03-35695 04-35279]
10/31/05	[5614832] Filed original and 50 copies Appellees Geico General Ins., et al., amended petition for rehearing en banc, 19 p.pages, served on 10/28/05 (PANEL, ALL ACTIVE JUDGES AND INTERESTED SENIOR JUDGES) [04-35279] (hh)[04-35279]
	* * *
1/25/06	OPINION FILED (Stephen R. REINHARDT, Marsha S. BERZON, Jay S. BYBEE): REVERSED REMANDED. Order: The opinion and dissent filed on 10/3/05, amended on 10/24/05 is withdrawn. It may not be cited as precedent by or to this court of any dc of the 9th Circuit. The clerk shall file the attached opinion in its place. [03-35695, 04-35279] (gar) [03-35695 04-35279]
	* * *
2/15/06	[5724774] Filed original and 50 copies Appellees Geico General Ins., et al., second amended petition for rehearing en banc; 18 p.pages, served on 2/14/06 (PANEL, ALL ACTIVE JUDGES AND INTERESTED SENIOR JUDGES) [04-35279] (hh)[04-35279]

* * *

3/29/06 Filed Appellant Ajene Edo's response to appellees' second amended petition for rehearing en banc [5724774-1], 15 pages; served on 3/28/06 (PANEL, ALL ACTIVE JUDGES AND INTERESTED SENIOR JUDGES) [04-35279] (hh) [04-35279]

* * *

4/20/06 Filed order (Stephen R. REINHARDT, Marsha S. BERZON, Jay S. BYBEE): denying petitions for panel rehearing and petitions for enbanc rehearing [5725174-1] [5724774-1] The mandate shall issue forthwith. [03-35695, 04-35279] (gar) [03-35695 04-35279]

4/20/06 MANDATE ISSUED with costs taxed against aple in the amount of $395.10 [03-35695, 04-35279] (gar) [03-35695 04-35279]

7/24/06 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 06-82 filed on 7/19/06. [03-35695, 04-35279] (gar) [03-35695 04-35279]

10/3/06 Received notice from Supreme Court, petition for certiorari GRANTED on 9/26/06. Supreme Court No. 06-100 PANEL (gar) [03-35695 04-35279]

RELEVANT DOCKET ENTRIES
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

NO. CV 3-02-00678 BR

7/22/02	14	Stipulated Protective Order: Signed 7/19/02 by Judge Anna J. Brown. (ljl,) (Entered: 07/23/2002)
		* * *
5/15/03	68	Third Amended Complaint for Violation of Fair Credit Reporting Act. Filed by Ajene Edo against Geico Casualty Company, Geico General Insurance Company, Geico Indemnity Company, Government Employees Insurance Company. (ljl,) (Entered: 05/16/2003)
5/23/03	69	Answer to Third Amended Complaint for Violation of Fair Credit Reporting Act. Filed by all defendants. (Related document(s) 68) (ljl,) (Entered: 05/27/2003)
		* * *
10/3/03	105	Renewed Motion for Summary Judgment Oral Argument Requested. FILED UNDER SEAL. Filed by all defendants. (ljl,) (Entered: 10/07/2003)
10/3/03	106	Concise Statement of Material Fact FILED UNDER SEAL. Filed by all defendants. (ljl,) (Entered: 10/07/2003)

10/3/03	107	Memorandum in Support of Renewed Motion for Summary Judgment. FILED UNDER SEAL. Filed by all defendants. (Related document(s)105) (ljl,) (Entered: 10/07/2003)
10/3/03	108	Affidavit of Meloney Cargil Perry in Support of Renewed Motion for Summary Judgment. FILED UNDER SEAL. Filed by all defendants. (Related document(s)105) (ljl,) (Entered: 10/07/2003)

* * *

10/31/03	111	Response to Defendants' Concise Statement of Material Facts in Support of Defendants' Renewed Motion for Summary Judgment. FILED UNDER SEAL. Filed by Ajene Edo. (Related document(s)106) (ljl,) (Entered: 11/03/2003)
10/31/03	112	Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment. FILED UNDER SEAL. Filed by Ajene Edo. (Related motion(s)105) (ljl,) (Entered: 11/03/2003)
10/31/03	113	Affidavit of Mark A. Friel in Support of Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment. FILED UNDER SEAL. Filed by Ajene Edo. (Related document(s)112) (ljl,) (Entered: 11/03/2003)

* * *

11/21/03	118	Concise Statement of Material Fact in Support of Defendants' Reply to Plaintiff's Response to Defendants' Renewed Motion for Summary Judgment. FILED UNDER SEAL. Filed by all defendants. (ljl,) (Entered: 11/25/2003)
11/21/03	119	Memorandum in Support of Defendants' Reply to Plaintiff's Response to Defendants' Renewed Motion for Summary Judgment. FILED UNDER SEAL. Request for Oral Argument. Filed by all defendants. (Related document(s)87) (ljl,) (Entered: 11/25/2003)
11/21/03	120	Affidavit of Meloney Cargil Perry in Support of Defendants' Reply to Plaintiff's Response to Defendants' Renewed Motion for Summary Judgment. FILED UNDER SEAL. Filed by all defendants. (Related document(s)87) (ljl,) (Entered: 11/25/2003)
		* * *
2/24/04	128	ORDER: Opinion and Order: For the reasons indicated, the Court GRANTS Defendants' Renewed Motion for Summary Judgment (#105), GRANTS Defendants' Renewed Motion to Strike Expert Declaration of Birny Birnbaum (#121), and DISMISSES this action with prejudice. See 12 page Opinion. Signed on 2/23/2004 by Judge Anna J. Brown. (sm,) (Entered: 02/24/2004)

2/24/04	129	Judgment: Case dismissed with prejudice. Signed 2/23/2004 by Judge Anna J. Brown. (sm,) (Entered: 02/24/2004)
3/18/04	130	Notice of Appeal (with attached Representation Statement and Statement of Related Cases) To USCA - 9th Circuit from judgment entered 2/24/04. Filing fee in amount of $255 collected; Receipt No. 175323 issued. (Related Document(s): Judgment 129) (tomg,) (Entered: 03/23/2004)

[filed 5-16-03]

[Clerk's Stamp Illegible]

[Case caption and document footer omitted in printing]

PLAINTIFF'S THIRD AMENDED COMPLAINT FOR VIOLATION OF FAIR CREDIT REPORTING ACT

SUMMARY AND OVERVIEW

1. This is a class action on behalf of all "new business" purchasers of automobile insurance policies from GEICO Casualty Company ("GEICO Casualty"), GEICO General Insurance Company ("GEICO General"), GEICO Indemnity Company ("GEICO Indemnity"), and Government Employees Insurance Company ("Government Employees") — from May 24, 2000 to date (the "Class Period").

2. Defendant GEICO Casualty is an affiliate of GEICO General, GEICO Indemnity and Government Employees, and is licensed to do business in Oregon and sells automobile insurance in Oregon.

3. Defendant GEICO General is an affiliate of GEICO Casualty, GEICO Indemnity and Government Employees, and is licensed to do business in Oregon and sells automobile insurance in Oregon.

4. Defendant GEICO Indemnity is an affiliate of GEICO Casualty, GEICO General and Government Employees, and is licensed to do business in Oregon and sells automobile insurance in Oregon.

5. Defendant Government Employees is an affiliate of GEICO Casualty, GEICO General and GEICO Indemnity, and is licensed to do business in Oregon and sells automobile insurance in Oregon.

6. Since at least December 1998, defendants have used information contained in consumer reports when underwriting or rating policies for automobile insurance. Defendants have taken adverse actions with respect to

plaintiff and those similarly situated based on this information, but have failed to provide the notification of the adverse action as required by the Fair Credit Reporting Act, 15 U.S.C. §1681.

JURISDICTION AND VENUE

7. Jurisdiction is conferred by 15 U.S.C. §1681. The claims asserted herein arise under 15 U.S.C. §1681.

8. Venue is proper in this District pursuant to 15 U.S.C. §1681. Defendants do business in this District and many of the insurance policies involved in this case were issued in this District.

BACKGROUND TO THE CLASS PERIOD

9. On or before December 1998, defendants began using consumer report information to underwrite or rate automobile insurance policies.

FIRST CLAIM FOR RELIEF

For Violation of 15 U.S.C. §1681

10. Plaintiff incorporates paragraphs 1 through 9 by reference.

11. Plaintiff Ajene Edo and all others similarly situated, purchased automobile insurance policies from defendants during the Class Period. Defendants took an adverse action with respect to underwriting or rating the policies of plaintiff, and all other similarly situated, based on information contained in a consumer report.

12. 15 U.S.C. §1681(m) requires users of consumer reports to provide oral, written or electronic notice of any adverse action taken with respect to any consumer that is based in whole or in part on information obtained in a consumer report.

13. Defendants willfully failed to notify plaintiff, and all others similarly situated, of the adverse action.

14. 15 U.S.C. §1681(n) provides that any person who willfully fails to comply with any requirement imposed under §1681(n) is liable to the consumer for damages of not

less than $100 and not more than $1,000. Accordingly, plaintiff, and all those similarly situated, are entitled to recover statutory damages.

15. Plaintiff, and all those similarly situated, are also entitled under 15 U.S.C. §1681(n) to recover such amount of punitive damages as the court may allow.

16. 15 U.S.C. §1681(n) provides that the cost of the action together with reasonable attorney fees as determined by the court are also recoverable by the plaintiff, and all others similarly situated.

CLASS ACTION ALLEGATIONS

17. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who purchased "new business" automobile insurance policies from defendants from May 24, 2000 to date.

18. The members of the Class are so numerous that joinder of all members is impracticable. During the Class Period, defendants issued hundreds of "new business" policies. The disposition of their claims in a class action will provide substantial benefits to the parties and the Court.

19. There is a well-defined community of interest in the questions of law and fact involved in this case. Questions of law and fact common to the members of the Class which predominate over questions which may affect individual Class members include:

i. Whether the underwriting or rating practices of defendants constitute adverse actions under the Fair Credit Reporting Act;

ii. Whether 15 U.S.C. §1681 was violated by defendants;

20. Plaintiff's claim is typical of those of the Class because plaintiff and the Class failed to receive notification of the alleged adverse actions as required by the Fair Credit Reporting Act.

21. Plaintiff will adequately protect the interests of the Class and has retained counsel who are experienced in class action litigation. Plaintiff has no interests which conflict with those of the Class.

22. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment as follows:

(1) Declaring this action to be a proper class action pursuant to Rule 23;

(2) Awarding plaintiff and the members of the Class statutory damages, punitive damages, attorney fees and costs; and

(3) Awarding such other legal and equitable relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

DATED this 14th day of May, 2003.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By /s/ Steve Larson
N. ROBERT STOLL, OSB No. 69165
STEVE D. LARSON, OSB No. 86354
Telephone: (503) 227-1600

And

CHARLES A. RINGO, OSB No. 89346
Telephone: (503) 643-7500

Attorneys for Plaintiff

[Filed 5-23-03]

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DEFENDANTS' ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT FOR VIOLATION OF FAIR CREDIT REPORTING ACT

For their ANSWER to Plaintiff's Third Amended Complaint for Violation of Fair Credit Reporting Act (the "Third Amended Complaint"), Defendants GEICO Casualty Company ("GEICO Casualty"), GEICO General Insurance Company ("GEICO General"), GEICO Indemnity Company ("GEICO Indemnity"), and Government Employees Insurance Company ("Government Employees") (collectively, "GEICO" or "Defendants"), admit, deny, and allege as follows:

FIRST DEFENSE

(Admissions and Denials)

1. GEICO denies each and every allegation contained in paragraph 1 of the Third Amended Complaint.

2. GEICO admits that GEICO Casualty is an affiliate of GEICO General, GEICO Indemnity and Government Employees, and is licensed to do business in Oregon and sells automobile insurance in Oregon.

3. GEICO admits that GEICO General is an affiliate of GEICO Casualty, GEICO Indemnity and Government Employees, and is licensed to do business in Oregon and sells automobile insurance in Oregon.

4. GEICO admits that GEICO Indemnity is an affiliate of GEICO Casualty, GEICO General and Government Employees, and is licensed to do business in Oregon and sells automobile insurance in Oregon.

5. GEICO admits that Government Employees is an affiliate of GEICO Casualty, GEICO General and GEICO

Indemnity, and is licensed to do business in Oregon and sells automobile insurance in Oregon.

6. GEICO admits that it has, from time to time, used information contained in consumer reports when underwriting or rating policies for automobile insurance. Otherwise, GEICO denies the remainder of the allegations contained in paragraph 6 of the Third Amended Complaint.

7. GEICO denies each and every allegation contained in paragraph 7 of the Third Amended Complaint.

8. GEICO admits that it does business in the State of Oregon. Otherwise, GEICO denies the remainder of the allegations contained in paragraph 8 of the Third Amended Complaint.

9. GEICO admits that it has used consumer report information from time to time to underwrite or rate automobile insurance policies. Otherwise, GEICO denies the remainder of the allegations contained in paragraph 9 of the Third Amended Complaint.

10. Paragraph 10 of the Third Amended Complaint contains no allegations to be admitted or denied. To the extent an answer is required, GEICO incorporates by reference its responses to the incorporated paragraphs as though set forth in full.

11. GEICO admits that Ajene Edo purchased an automobile insurance policy from GEICO Indemnity on or about December 27, 2000. Otherwise, GEICO denies the remainder of the allegations contained in paragraph 11 of the Third Amended Complaint.

12. The provisions of 15 U.S.C. §1681(m) speak for themselves. GEICO denies the remainder of the allegations contained in paragraph 12 of the Third Amended Complaint.

13. GEICO denies each and every allegation contained in paragraph 13 of the Third Amended Complaint.

14. The provisions of 15 U.S.C. §1681(n) speak for themselves. GEICO denies the remainder of the allegations contained in paragraph 14 of the Third Amended Complaint.

15. GEICO denies all of the allegations contained in paragraph 15 of the Third Amended Complaint.

16. The provisions of 15 U.S.C. §1681(n) speak for themselves. GEICO denies the remainder of the allegations contained in paragraph 16 of the Third Amended Complaint.

17. GEICO admits that Plaintiff is attempting to bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, but GEICO denies all other allegations contained in paragraph 17 of the Third Amended Complaint.

18. GEICO denies each and every allegation contained in paragraph 18 of the Third Amended Complaint.

19. GEICO denies each and every allegation contained in paragraph 19 of the Third Amended Complaint.

20. GEICO denies each and every allegation contained in paragraph 20 of the Third Amended Complaint.

21. GEICO denies each and every allegation contained in paragraph 21 of the Third Amended Complaint.

22. GEICO denies each and every allegation contained in paragraph 22 of the Third Amended Complaint.

AFFIRMATIVE DEFENSES

WHEREFORE, having fully answered the allegations of the Third Amended Complaint, GEICO asserts the following affirmative defenses:

SECOND DEFENSE

(Failure to State a Claim)

23. Plaintiff's Third Amended Complaint fails to state a claim under F.R.C.P. 12(b)(6).

THIRD DEFENSE

(Notification)

24. All adverse action notifications which were required to be provided by law were provided by Defendants.

FOURTH DEFENSE

(Reasonable Procedures)

25. Reasonable procedures were maintained by Defendants, in accordance with 15 U.S.C. §1681(m), to assure compliance with the provisions of the Fair Credit Reporting Act.

FIFTH DEFENSE

(Standing and Subject Matter Jurisdiction)

26. Plaintiff obtained an insurance policy from Defendant GEICO Indemnity. Plaintiff lacks standing to bring claims based upon any practices of, or policies issued by, any Defendant other than GEICO Indemnity. Therefore, this Court lacks subject matter jurisdiction over the other three Defendants – GEICO Casualty, GEICO General and Government Employees.

SIXTH DEFENSE

(Waiver, Estoppel)

27. Plaintiff's claims are, in whole or in part, barred by the respective doctrines of waiver and/or estoppel.

SEVENTH DEFENSE

(Non-Willful Conduct)

28. Any violation of the Fair Credit Reporting Act by Defendants, which is denied, was neither intentional nor willful.

EIGHTH DEFENSE

(Statute of Limitations)

29. The applicable statute of limitations bars Plaintiff's claims.

NINTH DEFENSE

(No Personal Jurisdiction)

30. This Court lacks personal jurisdiction over Defendants.

TENTH DEFENSE

(Improper Venue)

31. Venue in the District of Oregon is improper.

ELEVENTH DEFENSE

(No Damages)

32. Plaintiff's claims for statutory and punitive damages under 15 U.S.C. §1681(n) are barred as a matter of law.

WHEREFORE, Defendants request judgment as follows:

A. That Plaintiff's Third Amended Complaint be dismissed with prejudice and that Plaintiff take nothing thereby;

B. That this Court enter judgment for Defendants and against Plaintiff;

C. For costs and disbursements incurred in this action; and

D. For such other and further relief, either at law or in equity, to which Defendants may show themselves to be justly entitled.

DATED this 23rd day of May 2003.

MELONEY CARGIL PERRY
BAKER & McKENZIE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201
Telephone: (214) 978-3024
Facsimile: (214) 978-3099
E-Mail: meloney.cargil.perry@bakernet.com

and

/s/ Thomas A. Gordon
THOMAS A. GORDON
GORDON & POLSCER
121 S.W. Morrison Street, Suite 1200
Portland, Oregon 97204
Telephone: (503) 242-2922
Facsimile: (503) 242-1264
E-Mail: tgordon@gordon-polscer.com

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Exhibit B to Affidavit of Meloney Cargil Perry in Support of Defendants' Renewed Motion for Summary Judgment

AFFIDAVIT OF PAUL LAVREY, CORPORATE REPRESENTATIVE, IN SUPPORT OF DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF MARYLAND §
§
COUNTY OF MONTGOMERY §

BEFORE ME, the undersigned authority, on this day personally appeared Paul Lavrey, the corporate representative of Defendants, who after being by me first duly sworn, upon his oath deposed and stated as follows:

1. "My name is Paul Lavrey. I am over 18 years of age, and am employed by Government Employees Insurance Company. My business address is Government Employees Insurance Company, 5260 Western Avenue, Chevy Chase, Maryland, 20815. I have never been convicted of a felony or crime involving moral turpitude, and am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

2. I have been an employee of Government Employees Insurance Company for approximately 20 years. I have been the Director of Underwriting Research for Defendants GEICO Casualty Company ("GEICO Casualty"), GEICO General Insurance Company ("GEICO General"), GEICO Indemnity Company ("GEICO Indemnity") and Government Employees Insurance Company ("Government Employees") (collectively, "GEICO") for approximately 3 years. In my capacity as

Director of Underwriting Research of GEICO, I have become familiar with the operations and programs of GEICO. I have also become familiar with the underwriting and business policies of GEICO. I am authorized to make this Affidavit on behalf of GEICO.

3. GEICO used reasonable procedures in complying with the Fair Credit Reporting Act. In 1999, GEICO began using insurance scores in Oregon, with the aid of a credit scoring model developed by Fair Isaac Corporation, as one of the characteristics in determining company and/or tier placement. Initially, GEICO sent adverse action notices to any applicant that did not receive a policy with the preferred companies – Government Employees and/or GEICO General.

4. In 1999, GEICO began using its Computer-Assisted Underwriting ("CAU") system to determine specifically whether an applicant was adversely impacted by the use of the insurance score. The CAU system compared the company and tier placement that the applicant received, with the company and tier placement that would have been received if GEICO had not ordered an insurance score for the applicant. If the use of the actual insurance score resulted in placement in a company or tier with higher rates than the company or tier that would have resulted if the insurance score had not been ordered, an FCRA notice was automatically sent. The intent of the system change in 1999 was to identify the specific persons that were supposed to receive the adverse action notices.

5. In December 2002, GEICO made a change in determining how it defines who would receive an adverse action notice. GEICO began comparing an applicant's placement when using their actual insurance score with what their placement would have been when using the theoretically highest possible insurance score. If such comparison shows that the applicant would have been eligible for placement in a company or tier with lower rates, then GEICO sends an adverse action notice.

6. As a result of legislation passed in Washington State requiring this new process described in Paragraph 5 above, GEICO made the change in December 2002 for Washington State, and in other credit states as well.

7. When an applicant calls GEICO's 1-800 number to request a rate quote, the sales counselor completes the "applicant page" and collects the applicant's date of birth on the "driver page", and then the CAU system begins its process to order an insurance score. The insurance score is retrieved by the CAU system from Trans Union and the insurance score is combined with the other underwriting factors to determine company and tier placement. GEICO requests the insurance score in order to help determine the company and Tier placement within the four GEICO entities. The jury window will show the recommended company and tier (if applicable), but the sales counselor does not see the actual insurance score.

8. The CAU model is the model that all four of the GEICO companies use to place risks. The CAU system determines if the applicant meets the eligibility requirements for placement in Government Employees or GEICO General, which are both preferred risk companies. If the applicant does not meet these eligibility requirements, then the CAU system determines if the applicant meets the eligibility requirements for insurance with either GEICO Indemnity or GEICO Casualty, which are standard and non-standard insurance carriers, respectively. Once the CAU system determines company and tier placement (if applicable), the applicant is rated with the recommended company and is offered a rate quote with that particular company. The applicant then accepts or rejects the rate quote. If the applicant accepts the rate quote, then at the completion of the underwriting process, the company that offered the rate quote issues the policy contract to the insured, and charges a premium to the insured.

9. The procedure detailed above in Paragraphs 7 and 8 was followed with Plaintiff Ajene Edo ("Edo"). Edo

requested a rate quote from GEICO on or about December 26, 2000. A GEICO sales counselor processed Edo's application. The CAU system than requested an insurance score from Trans Union. Then the CAU system recommended placement in GEICO Indemnity. The rating system then rated Edo for GEICO Indemnity. Next, the sales counselor offered the rate quote to Edo for a policy with GEICO Indemnity. Edo accepted the rate quote with GEICO Indemnity. Upon completion of the underwriting process, GEICO Indemnity issued Edo a policy contract and charged him a premium. Edo's insurance coverage binder began on 12/26/2000 in the State of Oregon.

10. In order to determine whether Edo should receive an adverse action notice, the CAU system compared Edo's company and tier placement when using his actual insurance score, with the placement that would have resulted if his insurance score had not been used.

11. Edo would have received the same company and tier placement whether or not his insurance score was utilized.

12. For Edo, if you take the Total Weight including credit of 393, subtract out his Actual Credit Weight of 62, add back the Neutral Credit Weight of 56, you get the Total Weight with Neutral Credit of 387. Edo's actual company and tier placement was with GEICO Indemnity. Edo's hypothetical placement with Neutral Credit Weight was still GEICO Indemnity. The Neutral Weight is a mathematical formula developed by Fair Isaac Corporation.

13. All four companies, Government Employees Insurance Company, GEICO General Insurance Company, GEICO Indemnity Company, and GEICO Casualty Company, each issue, deny, and renew insurance policies. In addition, all four companies, Government Employees Insurance Company, GEICO General Insurance Company, GEICO Indemnity Company, and GEICO Casualty Company, each collect premiums and pay claims on their respective policies.

14. In general, the premium rates for a policy with GEICO Casualty are higher than the premium rates for a policy with GEICO Indemnity.

15. GEICO Casualty Company did not deny or cancel Plaintiff Edo's insurance policy, nor did GEICO Casualty Company increase the amount Edo was charged for insurance based on the use of an insurance score. GEICO Casualty Company did not reduce or adversely or unfavorably change the terms of coverage or amount on any insurance policy with Edo based on the use of an insurance score.

16. GEICO General Insurance Company did not deny or cancel Plaintiff Edo's insurance policy, nor did GEICO General Insurance Company increase the amount Edo was charged for insurance based on the use of an insurance score. GEICO General Insurance Company did not reduce or adversely or unfavorably change the terms of coverage or amount on any insurance policy with Edo based on the use of an insurance score.

17. Government Employees Insurance Company did not deny or cancel Plaintiff Edo's insurance policy, nor did Government Employees Insurance Company increase the amount Edo was charged for insurance based on the use of an insurance score. Government Employees insurance Company did not reduce or adversely or unfavorably change the terms of coverage or amount on any insurance policy with Edo based on the use of an insurance score.

18. Only those applicants that are federal, state, county or municipal government employees or military personnel are eligible for insurance with Government Employees.

19. GEICO has consulted, and will continue to consult, with legal counsel regarding the requirements of the FCRA, potential state and federal changes and decisions regarding the FCRA, and compliance therewith.

FURTHER AFFIANT SAYETH NOT.

/s/ Paul Lavrey
Paul Lavrey

SUBSCRIBED AND SWORN TO BEFORE ME on this 1st day of October 2003, to certify which witness my hand and seal of office.

/s/ Betty Lee
Notary Public in and for the State of Maryland

/s/ Betty Lee
Typed/Printed Name of Notary

My Commission Expires:

3-1-2004

[seal]

[filed 10-03-03]

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CONCISE STATEMENT OF MATERIAL FACTS IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

Pursuant to LR 56.1, Defendants GEICO Casualty Company, GEICO General Insurance Company, GEICO Indemnity Company and Government Employees Insurance Company (collectively, "GEICO" or "Defendants"), submit the following Concise Statement of Material Facts in Support of Defendants' Renewed Motion for Summary Judgment:

1. Plaintiff Ajene Edo ("Edo") is the sole remaining Plaintiff in this action. *See* Stipulated Notice of Dismissal of Christina Sams, Matt Blevins and Ami Abarbanel, on file with this Court; and Plaintiff's Third Amended Complaint for Violation of Fair Credit Reporting Act (the "Complaint") at ¶11, on file with this Court.

2. Edo was issued Policy No. ZH-29-08 underwritten by GEICO Indemnity Company ("GEICO Indemnity"), effective December 27, 2000. *See* Affidavit of Paul Lavrey, Corporate Representative, in Support of Motion for Summary Judgment ("Lavrey Aff. (1st)") at ¶3, and Exhibit "A" thereto (all of which are included as Exhibit "A" to the Affidavit of Meloney Cargil Perry in Support of Renewed Motion for Summary Judgment (the "Perry Aff.")).

3. None of the other Defendants (GEICO Casualty Company, GEICO General Insurance Company or Government Employees Insurance Company) in this action ever issued or underwrote any policy of insurance to Edo. *See* Lavrey Aff. (1st) at ¶4.

4. Edo has alleged only one cause of action against Defendants; specifically, Edo alleges that Defendants "took an adverse action with respect to underwriting or rating the

policies of plaintiff, and all other similarly situated, based on information contained in a consumer report ... [and] willfully failed to notify plaintiff and others similarly situated, of the adverse action" and that this constitutes a violation of 15 U.S.C. §1681(m) and (n). *See* Complaint at ¶¶11 and 13, on file with this Court.

5. Edo is not seeking any actual damages; Edo is only seeking statutory damages. *See* Plaintiff's Supplemental Response to Defendants' First Set of Interrogatories, Answer to Interrogatory No. 6, attached as Exhibit "J" to the Perry Aff.

6. Edo's personal claim, as well as his claims on behalf of the purported class, relate only to "new business" policies underwritten by GEICO. *See* Complaint at ¶1, on file with this Court.

7. GEICO has, at all times, used its best efforts to comply with the Fair Credit Reporting Act ("FCRA"), *See* Lavrey Aff. (1st) at ¶5.

8. At the time Edo applied for insurance with GEICO, his insurance score was a factor in determining which of the defendants he qualified for a rate quote and coverage with, and in which rating tier he would be placed in with that particular Defendant. *See* Lavrey Aff. (1st) at ¶6; *see also* Lavrey Aff. (3rd) at ¶14.

9. Whenever GEICO obtained an insurance score on an individual requesting an insurance quotation, its procedure was to compare the company and tier placement that would result when using the insurance score as an underwriting factor, with the company and tier placement that would result if credit was not used. If the comparison showed that the use of credit had an adverse impact on an individual's company or tier placement, an adverse action letter would be sent to the individual in accordance with the Fair Credit Reporting Act. This procedure was followed with Plaintiff Edo. His insurance score had no impact on either his company or tier placement, i.e., his premium would have been identical even if his insurance score had

not been used in underwriting, so an adverse action letter was not sent to him. *See* Lavrey Aff. (1st) at ¶7.

10. Since Edo received the same company and tier placement he would have received if credit was not used, no "adverse action" notice was sent, as no "adverse action" was taken against Edo. *See* Lavrey Aff. (1st) at ¶8.

11. GEICO Indemnity did not deny or cancel Edo's insurance policy. *See* Lavrey Aff. (1st) at ¶9. GEICO Indemnity did not increase the amount Edo was charged for insurance based on the use of an insurance score. *See* Lavrey Aff. (1st) at ¶10. GEICO Indemnity did not reduce, or adversely or unfavorably change, the terms of coverage or amount of Edo's policy based on the use of an insurance score. *See* Lavrey Aff. (1st) at ¶11.

12. The GEICO entity to which Edo "applied" for insurance was GEICO Indemnity. *See* Affidavit of Paul Lavrey, Corporate Representative, In Support of Defendants' Renewed Motion for Summary Judgment ("Lavrey Aff. 3rd)") at ¶5, and Exhibit "A" thereto, which is included as Exhibit "C" to the Perry Aff.

13. In Oregon, when a customer calls GEICO's "1-800" telephone number to request a rate quote, the telephone sales counselor gathers basic information about the caller in the computer. Then, the computer system orders an insurance score if the caller has not refused the obtaining of credit information. The insurance score is obtained from Trans Union; then the insurance score is combined by the Computer Assisted Underwriting ("CAU") system with the other underwriting factors to determine company and tier placement within one of the four GEICO entities. A window will then appear on the telephone sales counselor's computer screen showing the recommended company and tier, but the telephone sales counselor does not see the actual insurance score. *See* Lavrey Aff. (3rd) at ¶3.

14. Before a rate quote can be offered, the CAU system must determine the company, if any, with which the potential customer is eligible to obtain a rate quote. It is

possible that a potential customer will not be eligible for a rate quote with any GEICO company. Once the CAU system determines the company with which the customer is eligible and tier placement, the customer is rated with the recommended company and is offered a rate quote with that particular company, subject to the conditions that the Motor Vehicle Report ("MVR") and Comprehensive Loss Underwriting Exchange ("CLUE") reports to be ordered, and the application to be completed, are materially consistent with the information provided by the potential customer. The potential customer then accepts or rejects the rate quote. If the potential customer accepts the rate quote, the company that offered the rate quote then obtains the MVR and CLUE reports, issues the policy contract to the customer, and charges a premium to the customer. The customer completes and signs the application after accepting the rate quote from the particular company. *See* Lavrey Aff. (3rd) at ¶4.

15. The procedure detailed in Paragraphs 13 and 14 was followed with Edo. Edo requested a rate quote from GEICO on or about December 26, 2000. A GEICO telephone sales counselor processed Edo's rate quote. The computer system then requested an insurance score from Trans Union. Then the CAU system recommended placement in GEICO Indemnity. The rating system then rated Edo for GEICO Indemnity. Next, the telephone sales counselor offered the rate quote to Edo for a policy with GEICO Indemnity. Edo accepted the rate quote with GEICO Indemnity, subject to the conditions that his MVR and CLUE reports and his application would not be materially different from the information used to generate the rate quote. After obtaining his MVR and CLUE reports, GEICO Indemnity issued Edo a policy contract and charged him a premium. Edo's insurance coverage binder began on 12/26/2000 in the State of Oregon. Edo completed and signed an application on January 19, 2001 and mailed it back to GEICO. *See* Lavrey Aff. (3rd) at ¶5.

16. GEICO used reasonable procedures in complying with the Fair Credit Reporting Act. *See* Affidavit of Paul Lavrey, Corporate Representative, in Support of Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment (hereinafter, "Lavrey Aff. (2nd)") at ¶¶3-6, 12, and 15-17, which is included as Exhibit "B" to the Perry Aff.

17. Only those applicants that are federal, state, county or municipal government employees or military personnel are eligible for insurance with Government Employees. *See* Lavrey Aff. (2nd) at 18. At the time of his rate quote and application with GEICO Indemnity, Edo was not a member of the military or a government employee. *See* Deposition of Ajene Edo Dated January 28, 2003 at deposition pages 4-10.

18. GEICO has consulted, and will continue to consult, with legal counsel regarding the requirements of the FCRA, potential state and federal changes and decisions regarding the FCRA, and compliance therewith. *See* Lavrey Aff. (2nd) at ¶19.

19. In general, the premium rates for a policy with GEICO Casualty are higher than the premium rates for a policy with GEICO Indemnity. *See* Lavrey Aff. (2nd) at ¶14.

20. Neither GEICO Casualty Company, GEICO General Insurance Company, nor Government Employees Insurance Company denied or cancelled Edo's insurance policy, nor did any of them increase the amount Edo was charged for insurance based on the use of an insurance score. None of these companies reduced or adversely or unfavorably changed the terms of coverage or amount of any insurance policy with Edo based on the use of an insurance score. *See* Lavrey Aff. (2nd) at ¶¶15, 16, 17 and 18.

DATED this 3rd day of October 2003.

/s/ Meloney Cargil Perry
MELONEY CARGIL PERRY
BAKER & McKENZIE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201
Telephone: (214) 978-3024
Facsimile: (214) 978-3099
E-Mail: meloney.cargil.perry@bakernet.com

and

THOMAS A. GORDON
GORDON & POLSCER
121 S.W. Morrison Street, Suite 1200
Portland, Oregon 97204
Telephone: (503) 242-2922
Facsimile: (503) 242-1264
E-Mail: tgordon@gordon-polscer.com

[filed 10-31-03]

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PLAINTIFF'S RESPONSE TO DEFENDANTS' CONCISE STATEMENT OF MATERIAL FACTS IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

FILED UNDER SEAL, PURSUANT TO STIPULATED PROTECTIVE ORDER

Pursuant to Fed. R. Civ. P. 56 and LR 56.1(b), plaintiff Ajene Edo ("Edo") files this response to Defendants' Concise Statement of Material Facts in Support of Defendants' Renewed Motion for Summary Judgment ("DCSF").

1. For purposes of this motion only, plaintiff admits the assertions of fact in DCSF ¶¶ 1, 2, 4, 6, 8, 13-15, 17, and 19.

2. For purposes of this motion only, plaintiff admits the assertions of fact in DCSF ¶ 3, except to the extent that defendants assert they can be liable under FCRA *only* if they "issued or underwrote any policy of insurance to Edo." Any such assertion is a legal conclusion that is contradicted by the clear language of 15 U.S.C. § 1681a(k)(1)(B)(i), the FTC's interpretation of the Fair Credit Reporting Act ("FCRA"), and FCRA's legislative history.

3. For purposes of this motion only, plaintiff admits the assertion in DSCF [sic] ¶ 5 that Edo is not seeking any actual damages. Plaintiff denies the remaining assertion in DCSF ¶ 5 since plaintiff's Third Amended Complaint is clear that, in addition to statutory damages, plaintiff is also seeking punitive damages, attorney fees and costs, and such other relief as the court deems just and equitable. See Third Amended Complaint at ¶¶ 14-15, and Page 5.

4. For the reasons set forth below, plaintiff denies the assertions in DCSF ¶ 7.

5. With respect to the assertions in DCSF ¶ 9, and for the purposes of this motion only, plaintiff admits that, at the time he applied for insurance with defendants, defendants' procedure was to compare the company and tier placement that would result when using the insurance score as an underwriting factor, with the company and tier placement that would result if credit were not used. For purposes of this motion only, plaintiff also admits that the premium offered to Edo would have been same [sic] had defendants not considered his credit information. For the reasons set forth below, plaintiff denies the remaining assertions in DCSF ¶ 9.

6. For the reasons set forth below, plaintiff denies the assertions in DCSF ¶ 10. Plaintiff further denies these assertions because they are legal conclusions that are contradicted by the clear language of FCRA, the FTC's interpretations, case law, and FCRA's legislative history.

7. For purposes of this motion only, plaintiff admits the assertions of fact contained in the first sentence of DCSF ¶ 11. For the reasons set forth below, plaintiff denies the remaining assertions in DCSF ¶ 11. Plaintiff further denies these assertions because they are legal conclusions that are contradicted by the clear language of FCRA, the FTC's interpretations, case law, and FCRA's legislative history.

8. For the reasons set forth below, plaintiff denies the assertions in DCSF ¶ 12. Plaintiff further denies these assertions because they are legal conclusions that are contradicted by the clear language of FCRA, the FTC's interpretations, case law, and FCRA's legislative history.

9. For the reasons set forth below, plaintiff denies the assertions in DCSF ¶ 16.

10. With respect to the assertions in DCSF ¶ 18, for the purposes of this motion only plaintiff admits that defendants have, in the past, consulted with in-house

attorneys on issues relating to FCRA. Plaintiff denies the remaining assertions in DCSF ¶ 18 because defendants have failed to lay an adequate foundation for the statements purportedly supporting DCSF ¶ 18.

11. For the reasons set forth below, plaintiff denies the assertions in DCSF ¶ 20. Plaintiff further denies these assertions because they are legal conclusions that are contradicted by the clear language of FCRA, the FTC's interpretations, case law, and FCRA's legislative history.

In addition to the facts stated above, plaintiff provides the following additional material facts that are relevant to this dispute:

12. Government Employees Insurance Company ("Government Employees") is the only defendant in this case with any employees, and all of the underwriting and rating for insurance policies sold by Government Employees, GEICO General, GEICO Indemnity, and GEICO Casualty, is performed by Government Employees (collectively, the defendants will be referred to as "GEICO"). March 17, 2003, Deposition of Paul Lavrey ("Lavrey March 2003 Depo."), Affidavit of Mark Friel in Support of Opposition of Defendants' Motion for Summary Judgment ("Friel Aff."), Ex. 1, at 10:5-20; 12:10-12; 14:6-15:11. These employees establish GEICO's policies and procedures with respect to underwriting and FCRA compliance, make state insurance rate filings on behalf of all GEICO companies, and take all action with respect to insureds and prospective insureds. Lavrey March 2003 Depo. at 10:5-20; 12:4-12; 26:2-27:12; 33:9-15; 149:5-12; Friel Aff., Ex. 1.

13. To make the underwriting and rating decisions, GEICO uses a so-called Computer-Assisted Underwriting system ("CAU"), a so-called "rating system," and insurance scores provided to GEICO by the credit agency Trans Union Corporation ("Trans Union"). Lavrey March 2003 Depo. at 17:4-9; 18:2-19; 34:2-14; 42:1-20; 47:1-8; 135:13-21; Friel Aff., Exs. 1 and 2.

14. When a prospective insured applies for insurance with GEICO, he or she begins by talking with one of GEICO's sales counselors, located in one of GEICO's sales and service centers, or regional offices. Lavrey March 2003 Depo. at 144:2-13; Friel Aff., Ex. 1. The sales counselor then informs the applicant that GEICO uses credit information to quote insurance. Lavrey March 2003 Depo. at 144:20-145:3; Friel Aff., Ex. 1. If the applicant consents to GEICO' s accessing his or her credit information, the sales counselor proceeds to access the applicant's consumer information and insurance score (provided by Trans Union) through GEICO's CAU. Lavrey March 2003 Depo. at 145:4-6; Friel Aff., Ex. 1. After the insurance score is obtained, the CAU processes all of the applicant's characteristics (including credit, as reflected in the insurance score) and determines in which GEICO company, and in which tier within that company, the applicant will be placed. Lavrey March 2003 Depo. at 19:1-4; 19:20-21:15; 47:1-5; Friel Aff., Exs. 1 and 3, at 1-2, 8-9.

15. During the placement process, an applicant is first considered for Government Employees and GEICO General. If he or she is not considered qualified for those companies, the applicant is next considered for GEICO Indemnity. If GEICO Indemnity is not considered appropriate, GEICO attempts to place the applicant with GEICO Casualty. Lavrey March 2003 Depo. at 54:20-55:7; Friel Aff., Ex. 1.

16. GEICO Casualty, which sells "non-standard" policies, is reserved for the "riskiest" insureds; GEICO General and Government Employees, which sell "preferred" policies, for the least "risky" insureds; and GEICO Indemnity, which sells "standard" policies, for those that fall somewhere in the middle. Lavrey March 2003 Depo. at 24:1-25:20; Friel Aff., Ex. 1.

17. With respect to GEICO Indemnity and GEICO General, the rates, classification factors, discounts, surcharges, and the amount of available coverage, are all more favorable in GEICO General (a preferred insurer) than

in GEICO Indemnity (a standard insurer). April 29, 2003 Deposition of Paul Lavrey ("Lavrey April 2003 Depo."), Friel Aff., Ex. 4, at 5:4-22:18; 54:11-20.

18. At the time Edo applied for insurance, the placement of the applicant would be compared with the placement of a hypothetical applicant whose consumer credit information was given an average weight. RCSF ¶ 8. In other words, the applicant's actual credit weight (which is based on the applicant's insurance score) was replaced with a "neutral" credit weight (which corresponds to an "average loss ratio relativity") and then the placement was re-calculated. These calculations were accomplished by GEICO's CAU-system. Lavrey March 2003 Depo. at 94: 1-4; 104:5-105:1; Friel Aff., Ex. 1.

19. Based on the results of the comparison between the two calculations, an "impact indicator" would be assigned: "U" meant the actual placement was higher than that of the hypothetical, "neutral-weighted" applicant; "N" meant the placement was the same; and "D" meant the applicant's placement was lower. Lavrey March 2003 Depo. at 93:13-95:1; Friel Aff., Ex. 1. If the actual applicant was placed no lower (or was placed higher) than the hypothetical, "neutral-weighted" applicant (and received an impact indicator of "N" or "U"), it was GEICO's policy *not* to send an adverse action notice. Lavrey March 2003 Depo. at 93:13-95:1; Friel Aff., Ex. 1. If the CAU system determined that an adverse action notice should be sent according to this procedure, it communicated that information to GEICO's electronic output system, which then determined what notice would be sent. Lavrey March 2003 Depo. at 124:20-125:21; Friel Aff., Ex. 1.

20. In Edo's case, after processing his application information (which included an insurance score generated by Trans Union) through the CAU, GEICO placed him in GEICO Indemnity. DCSF ¶ 2; Lavrey March 2003 Depo. at 34:2-14; Friel Aff., Ex. 1. If Edo's insurance score had been higher, he would have qualified for placement in GEICO

General, a more favorable placement in terms of rate, discounts, surcharges, and coverage. Lavrey March 2003 Depo. at 95:4-19; 117:11-14; 133:16-19; Lavrey April 2003 Depo. at 5:4-22:18; 54:11-20; Friel Aff., Exs. 1, 4, and 5, at Ex. A; Defendants' Supplemental Response to Plaintiffs' Interrogatory No. 6, Friel Aff. Ex. 7, at 2. Defendants did not give Edo notice of the adverse action. Defendants' Answer to Plaintiffs' Second Amended Requests for Admissions Nos. 17, 18, and 9 to Defendants, Friel Aff., Ex. 8, at 2.

21. Government Employees' director of underwriting research, Paul Lavrey, testified that: (1) GEICO's underwriting and rating system allows consumers to "benefit" from good credit by receiving a more favorable company and tier placement; (2) "GEICO has always considered it an adverse action to place someone in a higher rated company or a higher rated tier," and (3) all applicants "receive written disclosure if an adverse decision is made based upon a credit report," including "rejection, refusal to quote and higher rates." Lavrey March 2003 Depo. at 112:12-20; 115:8-116:3;142:7-10; 152:16-153:1; Friel Aff., Ex. 1.

22. In 1993 and 1994, Congress articulated its intent that the definition of "adverse action" in 15 U.S.C. § 1681a(k) must be interpreted broadly to include all actions that are adverse to the interests of the consumer. S. Rep. No. 103-209, at 4, 8 (1993), Friel Aff., Ex. 13; H.R. Rep. No. 103-486, at 26 (1994), Friel Aff., Ex. 14. In the amendments that ultimately became law in 1997, the phrase "actions included" indicates 15 U.S.C. § 1681a(k)'s definitions are illustrative only. 15 U.S.C. § 1681a(k)(1)(B)(i).

23. In July 1997, the Federal Trade Commission ("FTC") issued a prescribed notice informing users of consumer reports that all actions affecting consumers that have a negative impact are "adverse actions." 16 C.F.R. Pt. 601, App. C, Friel Aff., Ex. 9. In October 1998, the FTC issued an interpretive guideline for insurers that made it clear that the definition of "adverse action" was broad, and

could be interpreted to cover actions taken with respect to consumers with which there had been no previous contractual relationship. "Consumer Reports: What Insurers Need to Know," October 1998, Friel Aff., Ex. 10. In March 2000, the FTC released a staff opinion letter making it clear that the term "adverse action" was to be interpreted very broadly, and that the kinds of actions taken by defendant would fall within that term's definition. FCRA Staff Opinion: Stires-Ball (March 1, 2000), Friel Aff., Ex. 11.

24. In 1999, the Southern District for the District of Ohio concluded that the term "adverse action" included accepting applicants for new business on terms less favorable than those offered to other potential or existing customers. Mick v. Level Propane Gases, Inc., No. 98-CV-959, 1999 WL 33453772 (S.D. Ohio, Sept. 29, 1999), Friel Aff., Ex. 12.

25. Beginning in April 1999, and continuing through December 2002, GEICO began to follow a procedure whereby notice of adverse action would be given to new applicants only if the applicant's placement was lower than that of a hypothetical applicant who was assigned an average credit weight. Lavrey March 2003 Depo. at 74:6-14; 77:9-78:1; Friel Aff., Exs. 1 and 24. One of the stated purposes of implementing this policy was to "curb postal expenses." Lavrey March 2003 Depo. at 74:6-75:21; Friel Aff. Exs. 1 and 24.

26. In 1999 and again in 2002, defendants confirmed with the Oregon Department of Consumer and Business Services ("ODCBS") that applicants are given adverse action notices when they ask for a quote and are charged a higher rate because of information in their credit reports. Lavrey March 2003 Depo at 19:20-21:2; 150:20-151:5; Friel Aff., Exs. 1, 3 at 7, and 6 at 3. In an August 1999 filing with the ODBCS [sic], GEICO indicated that an applicant's "good credit" results in "more favorable" treatment. Lavrey March 2003 Depo. at 19:20-21:2; Friel Aff. Exs. 1 and 3.

27. GEICO's interpretation of FCRA at the time Edo was placed in GEICO Indemnity was unreasonable, unrealistic, and radical. Expert Report of Birny Birnbaum, Affidavit of Birny Birnbaum, Ex. 1, at 16-17 (attached to Friel Aff. as Ex. 25).

DATED this 31st day of October, 2003.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By /s/ Mark A. Friel
N. ROBERT STOLL, OSB No. 69165
STEVE D. LARSON, OSB No. 86354
MARK A. FRIEL, OSB No. 00259
Telephone: (503) 227-1600

And

CHARLES A. RINGO, OSB No. 89346
Attorneys for Plaintiff

* * *

[Case caption and document footer omitted in printing]

Exhibit 1 to Affidavit of Mark Friel in Support of Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment

The confidential deposition of PAUL W. LAVREY was held on Monday, March 17, 2003, commencing at 10:30 A.M., at the Embassy Suites, 4300 Military Road, N.W., Washington, D.C. 20014 before Louisa B. McIntire- Brooks, Notary Public.

REPORTED BY: Louisa B. McIntire-Brooks, RPR, CSR

[1]

APPEARANCES:

STEVE D. LARSON, ESQUIRE
On behalf of Plaintiffs

MELONEY C. PERRY, ESQUIRE
JONATHAN L. SHAFNER, ESQUIRE
THOMAS A. GORDON, ESQUIRE
On behalf of Defendants

[2]

STIPULATION

It is stipulated and agreed that the filing of this deposition with the Clerk of Court be and the same is hereby waived.

Whereupon,

PROCEEDINGS

MS. PERRY: Mr. Larson, my name is Meloney Perry and I represent GEICO. You presented us with two deposition notices today: One entitled amended notice of deposition, a 30(b)6, witness Paul Lavrey, appears to be for the first GEICO case, Christina Sams and Amber Sommer

versus GEICO Corporation, and it is dated January the 30th for four categories of testimony.

You've also served us today, or handed to us today, the amended notice of deposition of 30(b)6 witness Paul Lavrey which appears to be for the second GEICO case, Christina Sams [sic] Amber Sommer, Matt Blevins, Ajene Edo and Ami Abarbanel versus GEICO Casualty Company, GEICO General Insurance Company, GEICO Indemnity Company and Government Employees Insurance

* * *

[8]

have one in both the GEICO I case and in the GEICO II case, information you's [sic] elicit in one case cannot be used in the other case necessarily.

So, you have to establish separate bases in each case as if you were any other attorney representing any other plaintiff. That's our position. But, if you want to take it at the same time, that is what we do not agree to.

Whereupon,

PAUL W. LAVREY,

called as a witness, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

MS. PERRY: Mr. Larson, if I may, just on the record before we get started, Mr. Lavrey is here today to give testimony on four categories only as the corporate rep of the four defendants in the case number CV3-02-00678 BR. The four categories are how the characteristics and attributes for plaintiffs affected their company and tier placement upon application renewal or when new policy members appeared on the

* * *

[10]

phrase that I usually use. It's the protective order for this case, Sams-2, which is the number CV3-02-00678 BR.

EXAMINATION BY MR. LARSON:

Q Good morning, Mr. Lavrey. Who do you work for?

A I work for Government Employees Insurance Company.

Q How long have you worked for them?

A About 19 years.

Q What do you do for them?

A I'm director of underwriting research.

Q What does a director of underwriting research do?

A We – my area is in charge of reviewing any – doing any sort of research on our underwriting policies and procedures, determining what underwriting characteristics we should use, looking at our – the loss experience for – that we have produced under the policies and procedures.

Q I served an amended notice of deposition on

* * *

[34]

A Yes.

Q Are ~~you familiar~~ with how Government Employees Insurance Company obtains credit information about applicants for insurance or people that are insured by Government Employees Insurance Company or one of its affiliates?

MS. PERRY: Can I have the court reporter read that back?

(The reporter read back as requested.)

A Yes.

Q Tell me how.

A We obtain an insurance score from TransUnion for new business for anybody calling for a quote in states where we use credit.

Q And one time you must have requested it for people who were already insured as well; correct?

MS. PERRY: Objection, assumes facts not in evidence.

A I don't believe so.

Q So, when did you first start using credit scores or credit history in determining tier and

* * *

[42]

Q Let me hand you what's been marked as Exhibit 23. Can you tell me what that is?

A This is the Assist On-Line Agreement, and I'm sorry, on Deposition Exhibit Number 22, that appears to still be a Portfolio Review Agreement. I'm sorry.

Q So, is the Assist On-Line Agreement, Exhibit 23, the agreement by which Government Employees Insurance Company obtains credit, information on consumers to be used in determining tier and company placement?

A At new business, yes.

Q And that agreement, Exhibit Number 23, is between Government Employees Insurance Company TransUnion Corporation and Fair Isaac and Company?

A It appears to be between TransUnion, Fair Isaac and Company and GEICO.

A And when you say GEICO, who is GEICO?

A That would be Government Employees Insurance Company.

(Lavrey Deposition Exhibit Number 24 was

* * *

[47]

A And then those insurance scores are put in your CAU system?

A The insurance score is one of many characteristics that CAU uses to determine company and tier placement.

Q And that CAU system is maintained and operated by Government Employees Insurance Company?

A That's my understanding.

MS. PERRY: Mr. Larson, before we begin back with Paul Lavrey's testimony, I forgot at the beginning to, when we were discussing the two amended notices, and the one dealing with the first GEICO case that you brought for Sams and Sommer versus GEICO Corporation, that just to put on the record, that it is our understanding, I think, it's been testified to in the first case, that GEICO Corporation

does not sell insurance. Therefore, even if we were to allow to [sic] you go forward with the deposition in the first GEICO case, there is no one designated to testify regarding one, two, three and four because GEICO does not sell insurance. So, there is no one that's going to testify

* * *

[77]

placement with credit and the placement if you neutralize credit. And if you were – if the applicant was adversely impacted, it would send an indicator to send the form.

Q Let's call that the first change. Have there been any changes since that first change in 1999?

A Were there any changes in '99? Is that what you're asking?

Q Yes. Let me get that. Does this change that's [sic] referred to in Deposition Exhibit 37 occur in 1999?

A It's my understanding, yes.

Q Have there been any changes to the system for sending notices since 1999?

A There was a change that we made recently in determining how we define who would receive an adverse action notice.

Q What was that change?

[78]

A Rather than comparing against a neutral score, we compared against our highest credit weight.

Q When was that change made?

A I believe that was December 2002.

Q What prompted that change?

A There was an NAIC publication, draft publication, that NAII commented on. Part of that publication defined

an adverse action beyond what was defined — beyond whether or not — how an adverse action was defined in the adverse — or in the Fair Credit Reporting Act. NAII noted that that language was not part of the FCRA wording and came from a staff opinion letter. We got a hold of the staff opinion letter and saw that the FTC, in that opinion letter, appeared to have a different interpretation of an adverse action than what we were using. As a result, we decided to change.

Q What does NAII stand for?

A National Association of Independent Insurers.

Q What does NAIC stand for?

A National Association of Insurance Commissioners.

Q And the National Association of Insurance

* * *

[93]

A I'm not certain what the scores were at the time in October of '99. But, I believe this [sic] as an attempt to characterize the general weights for those credit scores. It's probably accurate.

Q You're drawing a distinction again between the score and the weight. Can you explain that to me?

A We don't use an actual score as a neutral. There is a weight that would be associated with neutral. It would appear in this case that in October of '99, in Oregon, that that neutral weight also corresponded to the weight — was the same weight that we had for scores between 589 and 694.

Q So, if you could, look at Deposition Exhibit 37 again. It is the system design document, Bate stamped GEICO II 39. Did you find that?

A Yes.

Q Halfway down the page there is what is listed, an

impact indicator. Do you see that?

A Yes.

Q Can you explain to me how an impact indicator worked?

* * *

[94]

A This is the indicator that would have been set when we — when CAU compared the placement with the actual credit score with what the placement would have been with a neutral credit score. If it improved the placement, then it was noted as a U or upward. If it had a negative impact, it was noted with a D, and if it did not have an impact, it was noted as an N.

Q Was anything done with respect to people that received a U?

A As far as adverse action notice?

Q Yes.

A No.

Q Was anything done as far as an adverse action notice done [sic] with respect to people that had an N?

A No.

Q Was anything done with respect to a Fair Credit Reporting Act notice with people that had a D?

A Yes.

Q What happened to those people?

A They would have received our adverse action [95] notice.

Q Which is Deposition Exhibit 30?

A Yes.

(Lavrey Deposition Exhibit Number 51 was marked for purposes of identification.)

Q Is that your affidavit?

A Yes, it is.

Q Did you prepare it?

A I would have worked with counsel to prepare this.

Q What counsel?

A With my counsel.

Q Your personal counsel or GEICO's counsel?

A GEICO's counsel.

Q Is that the attorneys here today?

A Yes.

Q And who prepared the exhibit attached to your affidavit?

A I did.

Q How did you do that? Is this just an Excel spread sheet or something like that?

* * *

[104]

A determined at the time we first implemented credit in our underwriting. Fair Isaac would have generated the neutral rate at that time.

Q How did they do that?

A The neutral weight represents the — it's a mathematical formula. It represents a constant — constant times the natural log of the loss ratio relativity of one which is average, average loss ratio of relatively [sic] plus a constant.

Q Who came up with that mathematical formula?

A Fair Isaac.

Q Why did they come up with that?

A Why did they come up with that formula?

Q Yes.

A The purpose of the model is to try to differentiate between risks with different loss ratios that will produce different loss ratios in the future. A loss ratio relativity of one will be the average loss ratio that's produced, and if we don't have information for characteristic [sic], we want to assume it's average with respect to the loss ratio. So, that's why they would [105] have used that formula to determine the neutral.

Q Did you ask them to use that formula to determine the neutral?

A No.

Q Did anyone at GEICO do you know?

A I don't know, but they would have been the ones to, I'm sure, to come up with that, that methodology.

Q Do you know if Fair Isaac was involved in the decision of designing the system to send notices to only those people who were considered to have a downward movement?

A I don't know.

Q Who would know?

A I'm not certain who would know.

Q Jim Hitt was probably still in his position at that time; right?

A No, Jim Hitt was not in his position.

Q Who was in your position at that time?

A I believe Alicia Bowen.

Q Where is Alicia Bowen now?

* * *

[112]

A I believe it would be Marie Motowylak.

Q Do you have interchange with Marie Motowylak now?

A On occasion.

Q For this second change that is instituted in December 2002, did you have interaction with Marie Motowylak?

A No.

Q Who did you have interaction with in the programming department?

A I believe it was Nancy Higgins.

Q Could you turn to Deposition Exhibit 10 which is a letter to Michael Greenfield from D.P. Weedon? Could you turn to page nine of that exhibit? If you look at pages eight, nine and ten, they appear to be an attachment to the letter. Do you see that?

A Yes.

Q Are you familiar with this credit scoring procedure document?

A I have probably seen it before.

Q Do you know what it's about?

* * *

[115]

was my only concern.

Q Do you know who the intended audience was for the credit scoring procedure document which is attached to the D.P. Weedon letter on pages eight, nine and ten which has been marked as Deposition Exhibit 10?

A Generally our procedures will be published for the sales counselors.

Q So, Exhibit 10, the credit scoring procedure, is telling the sales counselors that it's important to enter all the information under this processing heading; correct?

A Yes.

Q Because they're saying if you don't enter all the information, and someone has a good credit score, they'll just be given a neutral score and so they may not get the best company placement or tier placement; correct?

MS. PERRY: Objection. The document speaks for itself.

A It's saying they need to enter as much information as possible in order to increase the [116] likelihood that we'll actually find the person on the database. So, that if they have good credit, they can benefit from that.

Q Looking at your affidavit again, which we have marked as Deposition Exhibit 51, I believe the chart you prepared that's attached to it for Ajene Edo, he was actually placed in GEICO Indemnity; correct?

A Correct.

Q Does GEICO Indemnity have any tiers in Oregon?

A I believe at the time they did not.

Q If you use a neutral credit weight for Mr. Edo, he would have also been placed in GEICO Indemnity; correct?

A Correct.

Q But, under the system as it's been changed in December of 2002, he would be compared with the highest credit weight now; correct?

A His placement would be compared with the highest — his placement would be with the highest credit weight, yes. [117]

Q And his placement with the highest credit weight would have been in GEICO General tier three; correct?

MS. PERRY: Object, assumes facts not in evidence.

A Could you ask the question again? I'm sorry.

(The reporter read back as requested.)

MS. PERRY: Objection, assumes facts not in evidence.

A If you compare his placement with the theoretically highest possible credit weight, his placement with the theoretically highest placement weight would be GEICO General tier three.

Q So, if your present system that changed for the second time in December 2002 had been in place on December 26th, 2,000 [sic], Mr. Edo would have been sent a FCRA adverse action notice; correct?

A Correct.

Q But, as your system was set up on December 26th of 2000, he was not sent a FCRA adverse

* * *

[142]

MS. PERRY: I'm sorry. Can you say that question again?

(The reporter read back as requested.)

MS. PERRY: You're talking about now versus then? What is your time frame?

MR. LARSON: Well, let me rephrase it then.

Q GEICO has always considered it an adverse action to place someone in a higher rated company or a higher rated tier; hasn't it?

A Yes.

Q Is the table an algorithm?

A I'm not sure I understand your question.

Q Do you know what an algorithm is?

A Generally.

Q Can you tell me what it is?

A It's generally a formula to — it's a formula basically.

Q The table that you were describing, that is not a formula; is it?

A It's just a table, no.

Q Would it be difficult to rerate someone

* * *

[152]

Q That would be a programming issue?

A I would imagine.

Q You still have the data as to what a person's score is; correct?

A Yes.

Q You still have the data as to what the credit weights were; correct?

A Yes.

Q And you could apply the highest credit weight just like you do now; correct?

A It is possible to do it manually, yes.

Q It might be possible to program it?

MS. PERRY: Objection, speculation, assumes facts not in evidence.

A I'm not certain.

Q The previous question said, do all applicants, in quotes, receive written disclosure if an adverse decision is made based upon a credit report, adverse decision includes objection, refusal to quote and higher rates, and the answer is yes. Is that accurate?

[153]

A Yes, I believe it is.

Q Looking at Deposition Exhibit 39, can you tell us what that is?

A These are some frequently asked questions.

Q Again, that's something from your internet?

A Yes.

Q Is it also for the sales counselors?

A Some of this is probably for the service counselors as well.

Q Could you look at Exhibit 40? Can you tell us what that is?

A I believe that's another version of the one we looked at earlier, the credit guidelines.

Q Then Deposition exhibit 41, can you tell us what that is?

A This is some general information on sending out the FCRA notices.

Q Is that something from the internet or something else?

A Yes, this would be from the internet.

Q Again, on the second page it says note to

* * *

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Exhibit 3 to Affidavit of Mark Friel in Support of Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment
Deposition Exhibit 10

August 3, 1999 Recorded

The Honorable Michael M. Greenfield Express Mail
Director of Consumer and Business Services
Oregon Department of Consumer and Business Services
350 Winter Street NE 440-5
Salem, Oregon 97310-0220

ATTENTION: RATES AND FORMS – ED NIEUBUURT

RE: Government Employees Insurance Company #PC-0277-99
GEICO General Insurance Company #PC-0278-99
GEICO Indemnity Insurance Company #PC-0279-99
GEICO Casualty Insurance Company #PC-0280-99
Automobile Casualty Manual
Our File Number: 99-117

Dear Ms. Vitus:

Below is the response to your request for additional information dated July 6, 1999 regarding the above mentioned filing. The questions are repeated below in bold for easy reference.

1. **Your exhibits show the changes to base rates by coverage and territory. Explain how the numbers are used to create your tiers.**

The base rates by coverage and territory shown in these exhibits are the rates charged for the tier with the 1.00 factor. For tiers with factor [sic] other than 1.00 (e.g. 0.80) these base rates are multiplied by the tier factor to obtain the appropriate rate.

2. GEICO Indemnity manual page P-18 and GEICO Casualty manual page P-16 need additional explanation of what makes the tiers different and why the base rates vary.

The characteristics listed below are used to determine tier placement. Attributes for each of the characteristics listed generally fall into three categories: favorable, neutral and unfavorable and for some there are additional categories. We look at these characteristics and their respective attributes in combination with each other. The tier factors vary because risks with more favorable characteristics produce better loss experience than the risks with less favorable characteristics.

Characteristics

1. Non-negligent accidents within the last three years
    - Number of Accidents – More accidents are considered less favorable
    - Multiple Accidents by Same Driver – Multiple accidents by the same driver are considered less favorable
    - Time since last accident – Accidents within the last 12 months are considered less favorable
2. Theft/Vandalism incidents within the last three years
    - Number of Incidents – Multiple incidents are considered unfavorable
    - Time since last incident – Incidents within the last 12 months are considered less favorable
3. Convictions within the last three years
    - Number of Convictions – More convictions are considered less favorable

- Multiple Convictions by Same Driver – Multiple convictions by the same driver are considered less favorable
- Seriousness of the Conviction – Major convictions are considered less favorable than minor convictions
- Time since last conviction – Convictions within the last 12 months are considered less favorable
- Multiple Convictions for Same Offense – Multiple convictions for the same offense are considered less favorable

4. License Suspension or Revocation (driving only) within the last three years
    - Presence of Suspension – Suspensions are unfavorable
    - Suspension Length – Longer suspensions are less favorable than brief suspensions (less than 15 days)
5. Minimum Driver Age and Usage
    - Young Principle Operators are less favorable
6. Occupation Group
    - Occupations are divided into categories: favorable, neutral and unfavorable
7. Driving Experience
    - Experience Length – Greater experience is more favorable than less experience
8. Number of Drivers and Marital Status
    - Multiple Drivers on a policy is more favorable
    - Married Risks are more favorable

9. Knowingly Driving Without Insurance

    - Knowingly driving without insurance is less favorable

10. Credit History

    - Good credit history is more favorable

11. Home Ownership

    - Home ownership is more favorable

12. Education

    - Education beyond a high school diploma is more favorable than a high school education or less

13. Number of Vehicles

    - Multi-car policies are more favorable

14. Type of Vehicle

    - GEICO does not insure certain types of vehicles (e.g. all-terrain vehicles (ATV's) are not written by GEICO)

15. Usage

    - GEICO does not insure vehicles used in certain ways (e.g., wholesale and retail delivery is not written)

* * *

CREDIT REPORT UNDERWRITING QUESTIONNAIRE

Oregon Insurance Division

1. Identify your sources and the types of underwriting information (i.e.: MVR reports, credit reports, etc.) used:

a. by agents prior to quoting. Credit Score.

b. by agents prior to taking an application and/or binding coverage. CLUE Reports.

c. by insurer prior to issuing. MVR reports.

d. at policy renewal. Sometimes MVR reports are ordered.

2. a. What criteria are used to determine if a credit report is ordered?

A credit score is ordered on all inquiries.

b. Are the use of credit reports uniformly required for all quotations and sales?

Yes and yes.

c. Do you use credit scoring for renewal underwriting? If yes, is it the same formula used for new business? Explain in detail.

No.

3. Are credit reports used to prescreen applicants (explain yes answers in detail):

a. by agents prior to quoting? No.

b. by agents prior to taking application? Yes, it is a consideration in determining which company/tier to quote.

c. by insurer prior to issuing? No.

d. to determine if additional reports will be ordered? No.

4. Do you use a credit score to evaluate credit history for an applicant? If yes,

a. Who developed the scoring formula you are using? Yes, Fair Isaac.

b. Is the result used to determine the premium, underwriting acceptance, or both? Explain. It is one of the factors reviewed to determine company placement (preferred, standard or non-standard) and tier placement within company.

c. Is the formula available to the insurance regulator? If yes, include it. If no, please explain the elements used for the scoring process. Fair Isaac has not disclosed the formula to us. They have met with and disclosed the formula to some insurance departments. We use the score that is returned by the vendor.

d. Is the formula known to any employee of your company? No.

e. Is the credit score for all applicants or quotes kept on file? Explain. Yes, we keep all of the information gathered during the quote process on all inquiries.

f. What historical time frame is considered in the scoring? We do not know because Fair Isaac has not disclosed to us the details of their model.

5. What training is provided to your sales force regarding the use of credit reports? Provide copy of training plan and agents guide materials. See attached Credit Scoring Procedure and Consumer Report FAQ List (Attachment 5).

6. Are Credit reports ever used as the sole source to make acceptability and premium decisions? If yes, please explain in detail. No.

7. a. Explain in detail the handling of a "no hit", or "limited history" response on a credit inquiry.

"No hit" is treated as neutral credit score (neither good nor bad) in the placement decision. "Limited history" is treated as a negative factor in the placement decision.

b. Explain any situations where treatment differs from the treatment offered to your best credit scores.

There are none

c. If less favorable treatment is given, explain why.

N/A.

8. a. What steps have you taken to ensure that you are in compliance with the Fair Credit Reporting Act?

When the placement of a potential insured has been negatively impacted by credit, we send a letter that complies with the Federal Credit Reporting Act.

b. Do all applicants or requesters for a quotation get written disclosure if an adverse decision, including rejection, refusal to quote, or higher rate, is made based on a credit report?

Yes.

c. Are records of all adverse decisions maintained at the insurer's office? If not, explain.

Yes.

9. If you use credit report underwriting for multiple related insurers, would your answers differ if we treated the group as a single insurer? Explain.
No.

CREDIT SCORING PROCEDURE

Overview

Credit score has a direct relationship to loss experience. Since some major competitors already use credit scoring as an underwriting factor, this enhancement will give GEICO the opportunity to maintain a competitive position.

How it Works

Introduction

Credit Scoring is a new enhancement to the CAU process of risk selecting. When the counselor completes the name and address window, (providing we have all the information – name, address and social security number) the system will order a credit report behind the scenes. If we have the name and address but not the social security number, the system will not order the credit report until the date of birth or age is entered. There are some states that we will not order others require pre-notification. The credit report will be based on the applicant's information only. It is important to remember one thing, the counselor will not know whether the credit report was good, bad, a no hit or a timed out case, since this is done behind the scenes.

Scoring

While the counselor is completing the application, the credit report is being retrieved from our vendor and the score from the credit report is factored into the CAU process. This score from the report will not be visible, the jury window will only state Company recommended and Tier (if applicable).

Processing

Introduction

In order to insure [sic] the best possible match for the credit report, accurate information must be collected.

Please review the information listed in the categories below.

Name, Address and Date of Birth

It is very important when collecting information from the applicant that we get the complete name, address, date of birth (SalesTalk only) and whenever possible the social security number.

Always use proper abbreviations and always include the Jr. or Sr. with a name (if applicable). The more information we enter into the system the better chance of an exact match on the credit report. The system is set up to compare all the information provided against the vendor's database and return the best match.

If there is no match the system will return a neutral score and will continue to evaluate the risk using all underwriting factors available. Obviously, if the applicant has a real good credit rating and we failed to enter enough information to make a match, the neutral score returned will not be as high as his/her real score and could possibly affect placement. A neutral score is not damaging but a real score is much better.

See Exhibit A for recommended entries for names and addresses.

Pre-Notification States

The following states require pre-notification:

- Colorado
- New York
- Rhode Island
- Vermont
- Wisconsin

In these states SalesTalk will include a pop-up box for the counselor to answer. A word track is being created for instructing the applicant that we would like to order a credit report and asks their permission. If the applicant refuses

the counselor must click on the credit report option and select the "Refuse" button. In KCAU it will need to be manually turned off. In KCAU, there will be a required field located on the General Information Screen that the interviewer must fill in. The counselor must enter a "N" in the field for ordering the applicant's credit report. Refusal cases will receive a neutral credit score which will not help or hurt their CAU evaluation.

No Credit Report States

There will be no credit reports ordered in the following states, and they will receive a neutral score all the time:

- California
- Connecticut
- Hawaii
- Indiana
- Michigan

The following states are being deferred for further review to determine if credit scoring is feasible. State regulations and other criteria will need further reviewing. These states will also receive a neutral score until further notice:

- Florida
- Georgia
- Maine
- New Hampshire
- Rhode Island

Refusals in Non Pre-Notification States

In states that do not require a pre-notification, there may be some customers who are aware that many insurance companies order credit reports. If that consumer requests that a credit report not be ordered the counselor will have the ability to click the Credit Report Option on the menu

bar and select the "Refuse" push-button. In SalesTalk, the "Refuse" push-button must be selected before all the required information is collected or it will order automatically. In KCAU enter "N" in the credit report field.

Fair Credit Reporting Act

Customers who are not placed in GE/GG and who subsequently buy/bind the policy will receive a copy of the Fair Credit Reporting Act notification (FRCA) in their New Business package.

This notification will list the name, address and phone number of Trans Union (our credit report vendor) for the applicant to call if there is a question regarding their actual credit report.

For applications that are quoted and not sold, a SAS run will be produced and the FCRA notification will be mailed to them.

Recalls

When a counselor recalls a pending application the credit report will not be reordered unless it was not received during the first quote. This will only happen if the original credit score came back blank, the system timed out the transmission, a line problem, or a zero score and information used by CAU has been changed on the application. In those cases the credit score will be retrieved, if available, and the case reevaluated by CAU.

The counselor can force a rescore on a recall by going to the menu bar and selecting the credit reports option. However, a rescore should only be done in rare instances.

* * *

[Case caption and document footer omitted in printing]
Exhibit 5 to Affidavit of Mark Friel in Support of Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment
Deposition Exhibit 51

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION AND IS SUBJECT TO - A PROTECTIVE ORDER FROM THE COURT

AFFIDAVIT OF PAUL LAVREY

STATE OF MARYLAND §
§
COUNTY OF MONTGOMERY §

Before me the undersigned notary public on this day personally appeared Paul Lavrey, who upon being duly sworn by me stated under oath as follows:

1. "My name is Paul Lavrey. I am over 18 years of age, and am employed by Government Employees Insurance Company. My business address is Government Employees Insurance Company, 5260 Western Avenue, Chevy Chase, Maryland, 20815. I have never been convicted of a felony or crime involving moral turpitude, and am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

2. I have been an employee of Government Employees Insurance Company for approximately 19 years. I have been the Director of Underwriting Research for the Defendants GEICO Casualty Company, GEICO General Insurance Company, GEICO Indemnity Company and Government Employees Insurance Company ("GEICO") for approximately 3 years. In my capacity as Director of

Underwriting Research of GEICO I have become familiar with the operations and programs of GEICO. I have also become familiar with the business, business policies, record-keeping policies and protection of confidential and proprietary underwriting information for GEICO. I am authorized to make this Affidavit on behalf of GEICO.

3. I have read and reviewed Plaintiffs' Motion to Compel. Specifically, Plaintiffs' motion to compel documents responsive to Plaintiffs' Request for Production No. 8. Plaintiffs' Request for Production No. 8 requests GEICO to produce "The matrices used by defendants when using consumer credit reports or credit scores to underwrite or rate insurance." As I previously testified, the requested algorithm is Defendants' most confidential and proprietary trade secret. This information is essential to Defendants' business and is the product of years of development, experience and investment. This information is kept confidential, has limited distribution within Defendants' organizations, and is protected from disclosure to competitors. In fact, the only instance of this information being produced outside of the company is to state regulatory agencies, as required by, and as protected by statute. Release of these documents, if revealed to competitors, even accidentally, could destroy Defendants as viable entities.

4. It is my understanding that in lieu of producing the matrix, GEICO is producing the attached Exhibit "A," which contains the necessary information from the matrix with regard to credit. The information on the attached Exhibit "A" can be used to determine how a customer would be placed in a company and tier (if applicable) using a neutral credit (insurance) score in place of their actual credit score, or using the theoretically highest credit score in place of their actual credit score.

5. The columns represented in Exhibit "A" are defined in the following paragraphs 6 through 16.

6. retention number: The retention number is the customer identification number we use in the sales system.

7. state: The state is the rated state for the customer.

8. bound date: The bound date is the date that the policy was sold.

9. total weight including credit: The total weight including credit is the total weight of all characteristics of the customer. This includes the weight the customer received for the insurance score in addition to the weight received for all other underwriting characteristics, such as length of driving experience, accidents and convictions, etc.

10. insurance score: The insurance score is provided by Trans Union using the Fair Isaac Assist model.

11. actual credit weight, neutral credit weight, and highest credit weight: The actual credit weight, neutral credit weight and highest credit weight come from the Oregon credit weight tables shown on Exhibit "A", which details the Oregon credit weights effective 12/26/00, 3/31/02 & 4/15/02.

12. total weight with neutral credit: The total weight with credit neutralized is calculated as follows: Total weight including credit minus actual credit weight plus neutral credit weight.

13. total weight with highest credit: The total weight with highest credit score is calculated as follows: Total weight including credit minus actual weight plus highest credit weight.

14. actual placement: The actual placement is determined by looking up the total weight including credit in the cut score tables shown on Exhibit "A", which details the Oregon cut scores effective for 12/26/00, 3/31/02 & 4/15/02. This is how the actual company and tier (if

applicable) were determined by the Claims Assisted Underwriting (CAU) system.

15. placement with neutral credit weight: The placement with neutral credit weight is determined by looking up the total weight with credit neutralized in the cut score tables shown on Exhibit "A", which details the Oregon cut scores effective for 12/26/00, 3/31/02 & 4/15/02.

16. placement with highest credit: The placement with highest credit weight would be determined by looking up the total weight with highest credit weight in the cut score tables shown on Exhibit "A," which details the Oregon cut scores effective for 12/26/00, 3/31/02 & 4/15/02.

17. To use the credit weight table: Select the table that is in effect on the bound date. Find the range in which the insurance score falls. The credit weight on this row is the credit weight that the system used for this customer. The neutral weight is shown in the table. The highest credit weight is determined by selecting the row with the maximum credit weight. FURTHER AFFIANT SAYETH NOT."

/s/ Paul Lavrey
Paul Lavrey

Given under my hand and seal of office this 13th day of March, 2003.

/s/ [illegible]
Notary Public in and for the State of Maryland

My Commission Expires:

July 1, 2003

	State	Bound Date	Total Weight including Credit	Insurance Score	Actual Credit Weight	Neutral Credit Weight	Highest Credit Weight	Total Weight with Neutral Credit	Total Weight with Highest Credit	Actual Placement	Placement w/ Neutral Credit Weight	Placement w/Highest Credit Weight
Edo	OR	12/26/00	393	620	62	56	105	387	436	GI	GI	GG T3

OR Cut Scores Effective 12/26/00

Score Range	Company	Tier
513+	GG	2
419-512	GG	3
384-418	GI	

OR Credit Weights Effective 12/26/00

Description	Credit Weight	
No Hit	56	
001-529	0	
530-564	30	
565-589	42	
590-619	52	
620-644	62	
645-669	65	
670-694	65	
695-719	78	
720-744	97	
745-990	105	
No Score	56	
Line Down	56	
Timed Out	56	
Neutral	56	
Refused	56	

[This chart omits certain confidential information that remains under seal]

Exhibit 6 to Affidavit of Mark Friel in Support of Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment

Deposition Exhibit 36

Confidential – Subject to Jt. Stip. & Prot. Order

[Bates numbers and document footer omitted in printing]

Confidential Pursuant to ORS 192.501(2)

Addendum D: Page 1

CREDIT REPORT UNDERWRITING QUESTIONNAIRE

Oregon Insurance Division

Note: Reference to "credit reports" includes credit scoring and similar tools.

1) Identify the company's sources and the types of underwriting information (i.e.: MVR reports, credit reports, etc.) used:
   a) By agents prior to quoting- **Credit score**
   b) By agents prior to taking an application and/or binding coverage- **CLUE reports, MVR reports**
   c) By insurer prior to issuing- **MVR reports**
   d) At policy renewal- **Sometimes MVR reports are ordered**

2) What criteria are used to determine if a credit report is ordered? ***If the applicant does not object to our ordering an insurance score, the score is ordered on all inquiries for new business.***
   a) Are the use of credit reports uniformly required for all quotations and sales? **Yes.** Are the results uniformly applied? **Yes.** Please explain in detail any "no" answers.
   b) Does the company use credit scoring for renewal underwriting? **No.** If yes, is the

same formula used for both new and renewal business? Please explain in detail.

3) Please explain in detail the use of credit reports to prescreen an individual applicant:
   a) By agents prior to quoting? ***Yes- credit is one of many characteristics used to determine company and/or tier placement.***
   b) By agents prior to taking application? ***Yes, credit is one of many characteristics used to determine company and/or tier placement***
   c) By insurer prior to issuing? **No**
   d) To determine if additional reports will be ordered? **No**

4) Does the company use a credit score to evaluate credit history for an applicant? **Yes.** If yes, please explain the following in detail:
   a) Who developed the scoring formula the company is using? **Fair Isaac, Inc.**
   b) Is the result used to determine premium, underwriting acceptance, or both? **It is one of the factors reviewed to determine company placement (preferred, standard, or non-standard) and tier placement within company.**
   c) Is the formula available to the insurance regulator? If yes please include the formula and a complete description. If no, please explain the elements used for the scoring process. **Fair Isaac, Inc. has not disclosed the formula to us. We use the score that is returned by the vendor.**
   d) Is the formula known to any employee of the company? **No.**
   e) Is the credit score kept on file for each applicant or quote? **Yes, we keep all of the**

information gathered during the quote process on all inquiries.

f) What is the historical period considered in the scoring? **We do not know because Fair Isaac, Inc. has not disclosed to us the details of its model.**

5) What training is provided to the company's sales force regarding the use of credit reports? Please provide copies of all training plans and agent guide materials. **See attached Credit Scoring Procedure and Consumer Report FAQ List (attachment 5).**

6) Are credit reports used as the sole criterion used to determine acceptability and premium calculation? **No**

7) Explain in detail the handling of a "no hit" or "limited history" response to a credit inquiry. In the case of a "no hit," is the agent, applicant or policyholder allowed to correct errors in names, addresses, and Social Security numbers prior to an adverse underwriting decision? ***No-hits and limited history are considered slightly unfavorable based on GEICO loss experience. Generally counselors will not know that credit was a no-hit. However, if the counselor/agent or applicant believes that a no-hit was a possibility, he or she may attempt to update the name, address, social security number, and or date of birth in an effort to receive a hit on the credit database. At that time, our underwriting decision would be re-evaluated based an the credit information. If the applicant is quoted a higher rate as a result of a credit no-hit, we would notify the applicant of the adverse action by way of the letters sent pursuant to the Federal Credit Reporting Act and Oregon Statutes 746.650. If***

the applicant determines that erroneous information was used to order the credit report, they may contact us to update the information and have their application for insurance re-evaluated.

8) What procedures has the company established to consider information received from an applicant or insured concerning inaccuracies contained in a credit report? ***If a credit score adversely affects placement, we send the letter required by the Federal Credit Reporting Act and Oregon Statutes 746.650 to the customer. This form refers them to TransUnion to obtain a copy of the report. If the customer discovers inaccuracies on the report, TransUnion explains how to correct the errors. If the customer contacts us to advise that a correction has been made, we will reorder the credit report and re-evaluate the risk based on the updated information.***

9) What steps has the company taken to ensure that both the company and the company's agents are in compliance with the Fair Credit Reporting Act and ORS 746.600 to 746.690 as amended by Senate Bill 269? **When the placement of a potential insured has been negatively impacted by credit or another type of consumer report, we send letters that comply with the Federal Fair Credit Reporting Act and ORS Chapter 746. We have reviewed our policies and procedures in light of SB 269 and we are satisfied that they comply with the Fair Credit Reporting Act, ORS 746.600-690, as amended by Senate Bill 269.**

a) Do all applicants and quote requests receive written disclosure if an adverse decision is made based upon a credit report? Adverse

decision includes rejection, refusal to quote and higher rates. **Yes.**

a) Are records of all adverse decisions maintained at the insurer's office? If not, please explain. **Yes.**

10) If the company uses credit report underwriting for multiple related insurers would the answers to the questionnaire be different if the related insurers were treated as a single insurer? Please explain. **No.**

Confidential Pursuant to ORS 192.501(2)

Attachment 5 (2002) – pg. 1

Overview

Credit, or insurance score, has a direct relationship to loss experience. Since many major competitors use insurance scoring as an underwriting factor, this enhancement will give GEICO an opportunity to maintain a competitive position.

How it Works

Introduction

Insurance Scoring is an enhancement to the process of risk selection. After the counselor completes the applicant page and collects the applicant's date of birth on the driver page, the system will begin its process to order an insurance score. The process begins with pre-notification, where the counselor must select "OK" or "Refused" to determine whether or not we will order a [sic] insurance score. If the applicant does not object to our ordering the insurance score, the score will be based on the applicant's information only. It is important to remember that the counselor will not know whether the insurance score was good, bad, a no hit or a timed out case, since this is done behind the scenes.

Third Party Quotes

If you are quoting a rate for a third party, do not order an insurance score. Select the insurance Score Option on the menu bar and select the "Refuse" push-button. This step must be done before the applicant's date of birth is entered.

Scoring

While the counselor is completing the rest of the sales questionnaire, the insurance score is being retrieved from our vendor and the insurance score is combined with other underwriting factors to determine company and tier placement. This score from the report will not be visible,

the jury window will only state Company recommended and Tier (if applicable).

Processing

Introduction

To ensure the best possible match for the insurance score, accurate information must be collected. Please review the information listed in the categories below.

Name, Address and Date of Birth

It is very important when collecting information from the applicant that we get the complete name, address, date of birth and whenever possible the social security number.

Always use proper abbreviations and always include the "Jr." or "Sr." with a name (if applicable). The more information we enter into the system the better chance of an exact match on the insurance score. The system is set up to compare all the information provided against the vendor's database and return the best match.

If there is no match, the system will return a no-hit and will continue to evaluate the risk using all underwriting factors available. Obviously, if the applicant has a really good insurance score, and we failed to enter enough information to make a match, the score returned will not be as high as his/her real score and could possibly affect placement.

* * *

Confidential
Pursuant to ORS 192.501(2)

Attachment 5.1(2002)
Page 1

Consumer Report FAQ List

Some customers who call GEICO for a quote will receive a letter stating that we have obtained their consumer report from a consumer reporting agency. These letters might cause some policyholders to call us with questions or concerns. The purpose of this memo is to provide you with sufficient information to handle these calls and provide our customers with the excellent customer service they've come to expect from GEICO Direct.

Background

When a potential customer calls us for a quote, we take them through a short questionnaire where we collect information about them, their vehicles, and other factors that might influence their premium. The combination of these factors determine what company they qualify for, if any. We then develop a correct premium for the risk, using our rating rules to assign points based on the type of the risk the caller represents.

Our ability to accurately predict an applicant's likelihood of loss is crucial to properly underwriting a risk. Research in recent years has pointed to a high correlation between an applicant's credit history and their potential for loss.

Therefore, one of the factors we may consider in underwriting is the credit history of the applicant. The GEICO Direct Sales Counselor will not actually see the consumer report. We receive an insurance score that relates a person's credit history to the likelihood of having an automobile accident. The insurance score is combined

with other underwriting factors to determine company and tier placement.

We are required to advise the customer if they have been adversely affected by information contained in a consumer report. In the case of a credit report, it has detailed information about a person's credit history and credit exposure, as well as information about their accumulated debts. Although we use this information to help us evaluate an insurance application, we do not actually see the specific items on these reports. Confidentiality is maintained this way.

Note: Do not assume that a call regarding a "consumer report" will always mean a credit report; it may be an MVR or CLUE report. In general terms, a consumer report is where we obtain information in addition to the information the customer provided. The counselor should determine the type of report by asking for the name and address of the agency in the letter.

Frequently Asked Questions (FAQs)

What is a Consumer Report? What is a Consumer Reporting Agency?

Insurance companies use information in consumer reports, including your driving record, accidents, traffic violations, as well as credit information, to determine the level of risk for customers. This information is organized and provided to insurance companies by Consumer Reporting Agencies. The consumer reporting agency that GEICO uses for credit scoring is Trans Union.

Why do you use this information to decide what my premium will be?

All insurance companies base their premiums on how likely it is that a person will have an accident. Credit history, in conjunction with other factors including driving record

(verified by Motor Vehicle Reports – another type of consumer report), driving habits, type of car, etc., are used to determine an accurate premium.

Can I get a copy of the report?

Yes. If you'd like a copy of the consumer report, call the following consumer reporting agency for a free copy within 60 days. You can either call them at 1(800) 645-1938 or write to them at the address below:

Trans Union Consumer Relations
National Disclosure Center
760 W. Sproul Road
Springfield, Pennsylvania
19064-0390

What did the Consumer Report say, specifically?

In order to maintain confidentiality we don't see the actual report. We receive a credit (or insurance) score that relates a person's credit history to the likelihood of having an automobile accident.

What do I do if the credit report is wrong?

Contact the credit agency directly and notify them of any discrepancy. Once they change it in their records, call us back and we will re-evaluate your quote over the phone.

Will you ever run my credit history again?

We currently only access your credit report when you first apply to us.

Who gave you permission to access my credit information?

Under the law we have a permissible business purpose to access an applicant's credit information. In addition, we pre-notify all of our customers of our use of credit prior to requesting a credit score.

Can you remove this inquiry from my credit report?

By law, Trans Union (our vendor) cannot remove the "footprints" we leave on the credit report.

Will this inquiry hurt my chances of getting credit?

No, this inquiry does not affect your credit worthiness. This inquiry pos ts only to credit reports from Trans Union and is specially coded to indicate that it is an "insurance inquiry." Insurance inquiries are ignored by all major credit "systems" which evaluate credit information. Insurance inquiries are also identified on hard copy credit reports, which may be evaluated by an individual reviewing your credit history.

* * *

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Exhibit 7 to Affidavit of Mark Friel in Support of Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment

DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' INTERROGATORY NO. 6

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendants, GEICO Casualty Company, GEICO General Insurance Company, GEICO Indemnity Company and Governments [sic] Employees Insurance Company (collectively, "GEICO"), responds to Plaintiffs', Christina Sams, Amber Sommers, Matt Blevins, Ajene Edo, Ami Abarbanel, Fourth Set of Interrogatories to Defendants, as follows:

DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' FOURTH SET OF INTERROGATORIES TO DEFENDANTS

INTERROGATORY NO. 6: Please explain how characteristics and attributes, including insurance scores, were used to determine tier, company placement or rates for plaintiffs.

RESPONSE:

GEICO incorporates by reference its previous General and Specific Objections, and provides the following supplemental response:

In addition, even if Ms. Sams, Mr. Blevins and Ms. Abarbanel had the theoretically highest insurance score; GEICO would not have placed them in a different company or tier. Therefore, their hypothetical premiums would have remained the same.

If Mr. Edo had the theoretically highest insurance score, GEICO would have placed him in GEICO General Insurance Company, which has lower premiums than GEICO Indemnity Company where he was placed due, in part, to his actual insurance score.

DATED this 28th day of April, 2003.

/s/ Meloney Cargil Perry
MELONEY CARGIL PERRY
BAKER & McKENZIE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201
Telephone: (214) 978-3024
Facsimile: (214) 978-3099
E-Mail: meloney.cargil.perry@bakernet.com

* * *

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CONCISE STATEMENT OF MATERIAL FACTS IN SUPPORT OF DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

AUTHORIZED TO BE FILED UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER

Pursuant to LR 56.1, Defendants GEICO Casualty Company ("GEICO Casualty"), GEICO General Insurance Company ("GEICO General"), GEICO Indemnity Company ("GEICO Indemnity") and Government Employees Insurance Company ("Government Employees") (collectively, "GEICO" or "Defendants"), submit the following Objections and Reply to Plaintiff's Response to Defendants' Concise Statement of Material Facts in Support of Defendants' Motion for Summary Judgment ("DCSF").

DEFENDANTS' OBJECTIONS AND REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' CONCISE STATEMENT OF FACTS IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT ("RCSF")

Response to RCSF Paragraph 12: Defendants deny the statements in RCSF Paragraph 12. Defendants incorporate by reference Paragraphs 19 and 20 of their Concise Statement of Material Facts in Support of Defendants' Renewed Motion for Summary Judgment ("CSF"), previously filed with this Court.

Response to RCSF Paragraph 13: Defendants admit that they utilize a Computer-Assisted Underwriting ("CAU") system in the processing of a potential customer's company and tier placement. The CAU system obtains the potential customer's insurance score from Trans Union Corporation ("Trans Union"). Defendants deny all other parts of RCSF

Paragraph 13.

Response to RCSF Paragraph 14: While the statements in RCSF Paragraph 14 are generally correct, Defendants incorporate by reference CSF Paragraph 13. Defendants note that Plaintiff has admitted the veracity of CSF Paragraph 13. *See* RCSF Paragraph 1.

Response to RCSF Paragraph 15: Defendants deny Plaintiff's characterization as to a potential customer being "qualified." Defendants admit that the statements in RCSF Paragraph 15 are generally a description of how the system operates, however, GEICO incorporates by reference CSF Paragraph 14, previously filed with this Court. Defendants note that Plaintiff has admitted the veracity of CSF Paragraph 14. *See* RCSF Paragraph 1.

Response to RCSF Paragraph 16: Defendants deny Plaintiff's characterization of the risks underwritten by the various GEICO companies. All Defendants admit that they arc authorized to write automobile insurance policies in Oregon. GEICO Casualty focuses on writing automobile insurance polices in the non-standard market. Government Employees and GEICO General focus on writing automobile insurance policies in the preferred market. Finally, GEICO Indemnity focuses on writing automobile insurance polices in the standard market. Defendants deny any remaining allegations contained in RCSF Paragraph 16.

Response to RCSF Paragraph 17: Defendants admit that generally, more favorable rates are available in GEICO General than GEICO Indemnity, but it depends on the situation or potential customer. GEICO also admits that there may be additional or higher limits of coverage offered in GEICO General. *See* Deposition of Paul Lavrey dated 4/29/03 (hereinafter "Lavrey Depo. (April)") at 54:11-16. Plaintiff mischaracterizes testimony regarding classification. *See* Lavrey Depo. (April) at 17:8-16 and 17:21-18:1-9, where Mr. Lavrey testifies "no" to Plaintiffs question on the issue. The rates, discounts and surcharges are part of the overall rating plan. *See* Lavrey Depo. (April) at 51:9-21-52:1-16.

Defendants deny all other statements in RCSF Paragraph 17.

Response to RCSF Paragraph 18: Defendants admit the statements in RCSF Paragraph 18, except the characterizations that "the applicant would be compared with the placement of a hypothetical applicant" because the potential customer would be compared to the potential customer and not a hypothetical person. *See also* GEICO II—000012, 000039-42 and Lavrey Depo. (March) at 56:15-21-57:1; 74:6-21-75:1-4; 76:12-21-77:1-12.

Response to RCSF Paragraph 19: Defendants admit the statements in RCSF Paragraph 19 except that the potential customer's actual placement was compared to the potential customer's placement when using a neutral credit weight and not to a "hypothetical" potential customer as Plaintiff states.

Response to RCSF Paragraph 20: Defendants admit that GEICO's CAU system recommended that Edo be placed in GEICO Indemnity. As a result, GEICO Indemnity offered Edo a rate quote, which he accepted. Also, Defendants admit that if Edo had had the theoretically highest possible insurance score, he would have been eligible for placement in GEICO General; however, Edo did not have the theoretically highest possible insurance score. Defendants deny the remaining allegations contained in RCSF Paragraph 20.

Response to RCSF Paragraph 21: The referenced testimony is taken out of context and does not stand for the propositions urged by Plaintiff. Defendants admit that a potential customer can benefit in company and/or tier placement by having a high insurance score. Although Plaintiff argues on page 26 of his Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment ("Plaintiff's Memorandum") that this statement shows that Government Employees was the entity that took adverse action against Edo, the statement has nothing to do

with what Government Employees does or does not do with regard to the other corporate defendants. At the outset of the deposition, the witness explained that the name "GEICO" generally refers to all four companies. *See* Lavrey Depo. (March) at 13:3-16. Furthermore, the sentence "GEICO has always considered it an adverse action to place someone in a higher rated company or a higher rated tier" is taken out of context. As the deposition transcript shows, Edo's attorney was questioning Lavrey about the insurance rate Edo might have received had he had the highest possible credit rate, using the "current set up" or current procedure utilized by GEICO. *See* Lavrey Depo. (March) at 141:1-21; 142:1-10. In this context, Lavrey stated that if a potential customer's credit score, when compared with the theoretically highest possible credit weight resulted in placement in a higher price tier, the potential customer would have been sent an adverse action notice. It was within this context of questioning regarding the new procedure that Lavrey's statement was made. This statement is not evidence that the procedure actually in place at the time of Edo's application resulted in an adverse action to Edo. Defendants admit that a potential customer receives a FCRA notice if an adverse action has occurred. Defendants deny the remaining statements in RCSF Paragraph 21.

Response to RCSF Paragraph 22: Defendants deny the statements in RCSF Paragraph 22. Defendants deny that the referenced legislative measures, which were never enacted by Congress, contain the language paraphrased in Paragraph 22. The language of the legislative measures speaks for itself. Defendants deny that either S.Rep. No. 103-209 (1993) or H.R.Rep. No. 103-486 (1994), which report on legislative measures that were never enacted, reflect the intent of Congress with regard to the amendments enacted by Congress in 1996.

Response to RCSF Paragraph 23: Defendants admit the existence of the three referenced documents and state that

the content and actual language of those documents speaks for itself. Defendants deny that the referenced documents stand for the propositions stated. Defendants deny that any of these items rise to the level of binding statutory regulations or interpretations. Even Plaintiff has admitted that the informal guidelines and opinions of the Federal Trade Commission ("FTC") do not have the force of law. *See* Plaintiff's Memorandum, at 17.

Response to RCSF Paragraph 24: Defendants admit the existence of the opinion, *Mick v. Level Propane Gases, Inc.*, 1999 WL 33453772 (S.D. Ohio 1999) and state that the content and actual language of this opinion speaks for itself. Defendants deny that the opinion stands for the broad proposition stated or that *Mick* is relevant or persuasive authority for any issue raised in this insurance underwriting case. This Court has previously rejected the reasoning in *Mick* and declined to read participant liability into the plain language of § 1681m(a). *See Razilov, et al. v. Nationwide Mutual Ins. Co.*, 242 F. Supp 2d 977, 989 (D.Or. 2003). Furthermore, in *Mick* the court did not find that the actions of the defendant were in fact adverse actions. The discussion regarding adverse action was made with regard to whether the plaintiff had satisfied numerosity for class certification only. In a later appeal of the same case, *Mick v. Level Propane Gases, Inc.*, 183 F.Supp.2d 1014 (S.D.Oh. 2000), on appeal of the parties' motions for summary judgment, there was still no judicial determination that the defendant had undertaken an adverse action under the FCRA. For these reasons, the *Mick* case simply does not support the sweeping statement made by Plaintiff.

Response to RCSF Paragraph 25: Defendants deny the statements in RCSF Paragraph 25 because in 1999, a potential customer's actual placement was compared to the placement that the potential customer would have had if their insurance score was not utilized. It was not compared to a hypothetical potential customer. In addition, Defendants incorporate by reference DCSF Paragraph 22,

below.

Response to RCSF Paragraph 26: Defendants deny that the referenced documents and deposition testimony stand for the propositions stated. Defendants admit that in an August 3, 1999 filing with the Oregon Department of Consumer and Business Services [Friel Aff. Ex. 3], the following is stated:

> "The characteristics listed below are used to determine tier placement. Attributes for each of the characteristics listed generally fall into three categories: favorable, neutral and unfavorable and for some there are additional categories. We look at these characteristics and their respective attributes in combination with each other. The tier factors vary because risks with more favorable characteristics produce better loss experience than the risks with less favorable characteristics.
>
> Characteristics
> * * *
>
> 10. Credit History
> • Good credit history is more favorable"

Furthermore, in the August 3, 1999 filing, in response to the written question, "Do all applicants or requesters for a quotation get written disclosure if an adverse decision, including rejection, refusal to quote, or higher rate, is made based on a credit report?", GEICO answered "Yes". Defendants admit that in a 2002 document entitled "Credit Report Underwriting Questionnaire, Oregon Insurance Division" [Friel Aff Ex. 6], in response to the question "Do all applicants and quote requests receive written disclosure if an adverse decision is made based upon a credit report? Adverse decision includes rejection, refusal to quote and higher rates.", GEICO responded, "Yes".

Response to RCSF Paragraph 27: Defendants deny the statements in RCSF Paragraph 27. Defendants deny both the facts alleged in Paragraph 27 and furthermore, deny that the statement in Paragraph 27 is an accurate statement of page 16-17 of the Expert Report of Birny Birnbaum. Birnbaum did not say that GEICO's interpretation of FCRA at the time Edo was placed in GEICO Indemnity was unreasonable, unrealistic, and radical. Birnbaum made the statement "[t]his is an unreasonable, unrealistic and radical view *of insurance underwriting*" on page 16 of his report. This opinion was made within the context of what Birnbaum *thinks* GEICO's "views" are or "rationale" is regarding insurance underwriting, not the FCRA, and is not based on any evidence that GEICO in fact, held any such views.

DEFENDANTS' ADDITIONAL CONCISE STATEMENTS OF MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

These Concise Statement [sic] of Material Facts are in addition to CSF Paragraphs 1-20, previously filed with this Court:

21. GEICO used reasonable procedures in complying with the Fair Credit Reporting Act. In 1999, GEICO began using insurance scores in Oregon, with the aid of a credit scoring model developed by Fair Isaac Corporation, as one of the characteristics in determining company and/or tier placement. *See* Deposition of Paul Lavrey dated 3/17/03 ("hereinafter "Lavrey Depo. (March)" at 34:20-21 – 35:1-4. Initially, GEICO sent adverse action notices to any potential customer that did not receive a policy with the preferred companies – Government Employees and/or GEICO General. *See* Lavrey Depo. (March) at 67:11-19; 108:10-21-109:1-3; 121:11-21- 123:1-7. *See* Second Affidavit of Paul Lavrey in Support of Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment

(hereinafter, "Lavrey Aff. (2nd)"), previously filed with this Court, at 3.

22. In 1999, GEICO began using its Computer-Assisted Underwriting ("CAU") system to determine specifically whether a potential customer was adversely impacted by the use of the insurance score. The CAU system compared the company and tier placement that the potential customer received, with the company and tier placement that would have been received if GEICO had not ordered an insurance score for the potential customer. If the use of the actual insurance score resulted in placement in a company or tier with higher rates than the company or tier that would have resulted with the if [sic] the insurance score had not been ordered, an FCRA notice was automatically sent. *See* GEICO II-000012; 000039-42 and Lavrey Depo. (March) at 56:15-21-57:1; 74:6-21-75:1-4; 76:12-21-77:1-12. The intent of the system change in 1999 was to identify the specific persons that were supposed to receive the adverse action notices. *See* Lavrey Depo. (March) at 67:11-19; 108:10-21-109:1-3; 121:11-21-123:1-7. *See* Lavrey Aff. (2nd), previously filed with this Court, at 4.

23. In December 2002, GEICO made a change in determining how it defines who would receive an adverse action notice. *See* Lavrey Depo. (March) at 77:13-21-78:1. GEICO began comparing a potential customer's placement when using their actual insurance score with what their placement would have been when using the theoretically highest possible insurance score. *See* Lavrey Depo. (March) at 77:13-20; 87:16-21-88:1-3; 90:10-16; 118:16-20. If such comparison shows that the potential customer would have been eligible for placement in a company or tier with lower rates, then GEICO sends an adverse action notice. *See* Lavrey Depo. (March) at 91:2-6. *See* Lavrey Aff. (2nd), previously filed with this Court, at 5.

24. As a result of legislation passed in Washington State requiring this new process, GEICO made the change in December 2002 for Washington State, and in other credit

states as well. *See* Lavrey Depo. (March) at 78:2-14; 83:16-21-84:1-10. *See* Lavrey Aff. (2nd), previously filed with this Court, at 6.

25. In order to determine whether Edo should receive an adverse action notice, the CAU system compared Edo's company and tier placement when using his actual insurance score, with the placement that would have resulted if his insurance score had not been used. *See* Lavrey Aff. (2nd), previously filed with this Court, at 10.

26. Edo would have received the same company and tier placement whether or not his insurance score was utilized. *See* Exhibit "A" to Plaintiff's Exhibit 5. *See* Lavrey Aff. (2nd), previously filed with this Court, at 11.

27. For Edo, if you take the Total Weight including eredit of 393, subtract out his Actual Credit Weight of 62, add back the Neutral Credit Weight of 56, you get the Total Weight with Neutral Credit of 387. *See* Lavrey Depo. (March) at 99:10-20 and Exhibit "A" to Plaintiff's Exhibit 5. Edo's actual company and tier placement was with GEICO Indemnity. *See* Lavrey Depo. (March) at 116:4-8. Edo's hypothetical placement with Neutral Credit Weight was still GEICO Indemnity. *See* Lavrey Depo. (March) at 116:12-15. The Neutral Weight is a mathematical formula developed by Fair Isaac Corporation. *See* Lavrey Depo. (March) at 104:4-11. *See* Lavrey Aff. (2nd), previously filed with this Court, at 12.

28. Government Employees Insurance Company, GEICO General Insurance Company, GEICO Indemnity Company, and GEICO Casualty Company are affiliated insurance companies that are subsidiaries of GEICO Corporation. *See* Affidavit of Thomas M. Wells ("Wells Aff.") at ¶3.

29. While Government Employees Insurance Company is the only Defendant company that has employees (with the exception of employees in Florida), payroll expenses are allocated between Government Employees Insurance Company and the other three companies, GEICO General

Insurance Company, GEICO Indemnity Company, and GEICO Casualty Company. *See* Wells Aff. at ¶4.

30. All four companies, Government Employees Insurance Company, GEICO General Insurance Company, GEICO Indemnity Company, and GEICO Casualty Company, each issue, deny, and renew insurance policies. In addition, all four companies, Government Employees Insurance Company, GEICO General Insurance Company, GEICO Indemnity Company, and GEICO Casualty Company, each collect premiums and pay claims on their respective policies. *See* Lavrey Depo. (March) at 135:13-21 (regarding rating system is separate from CAU system). *See* Lavrey Aff. (2nd), previously filed with this Court, at 13.

DATED this 21st day of November 2003.

/s/ Meloney Cargil Perry

MELONEY CARGIL PERRY
BAKER & McKENZIE
2300 Trammel Crow Center
2001 Ross Avenue
Dallas, TX 75201
Telephone: (214) 978-3024
Facsimile: (214) 978-3099
E-Mail: meloney.cargil.perry@bakernet.com

and

THOMAS A. GORDON
GORDON & POLSCER
121 S.W. Morrison Street, Suite 1200
Portland, Oregon 97204
Telephone: (503) 242-2922
Facsimile: (503) 242-1264
E-Mail: tgordon@gordon-polscer.co

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(11)

No. 06-100

IN THE

Supreme Court of the United States

GEICO GENERAL INSURANCE COMPANY, GEICO INDEMNITY COMPANY, and GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Petitioners,

v.

AJENE EDO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

Robert D. Allen
Meloney Cargil Perry
Jay F. Utley
Brandon P. Long
Baker & McKenzie LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 978-3000

Maureen E. Mahoney
Counsel of Record
Richard P. Bress
Eric S. Volkman
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Petitioners GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit's construction of "willfully" under § 1681n of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, impermissibly permits a finding of willfulness to be based upon nothing more than negligence, gross negligence, or a completely good-faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law, rather than requiring proof of a defendant's knowledge that its conduct violated FCRA or, at a minimum, recklessness in its subjective form.

2. Whether the Ninth Circuit improperly expanded § 1681m of FCRA by holding that an "adverse action" has occurred and notice is required thereunder, even when a consumer's credit information has had either no impact or a favorable impact on the rates and terms of the insurance that would otherwise have been offered or provided.

LIST OF PARTIES

Petitioners GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company[1] were defendants in the district court and appellees in the court of appeals. GEICO Casualty Company was a defendant in the district court, but was not a party in the court of appeals and thus is not a party before this Court.

Respondent Ajene Edo was a plaintiff in the district court and the appellant in the court of appeals.

In the court of appeals, this case was consolidated for purposes of oral argument with another proceeding in which Jason Reynolds was the appellant and Hartford Financial Services Group, Inc. and Hartford Fire Insurance Company were the appellees.

RULE 26.9 STATEMENT

Government Employees Insurance Company is the parent corporation of GEICO General Insurance Company. GEICO Corporation is the parent corporation of Government Employees Insurance Company and GEICO Indemnity Company, and is itself an indirect subsidiary of Berkshire Hathaway. No publicly held corporation owns ten percent or more of the stock of Government Employees Insurance Company, GEICO Indemnity Company, or GEICO General Insurance Company.

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[1] In this brief, the generic "GEICO" will be used to refer collectively to all of the GEICO companies that are petitioners in the case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a)[2] is reported at 435 F.3d 1081. The opinion of the district court (Pet. App. 37a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 25, 2006. Petitioners timely filed a petition for rehearing and rehearing *en banc*, which was denied on April 20, 2006. Pet. App. 49a. The petition for a writ of certiorari was filed on July 19, 2006, and granted on September 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant constitutional and statutory provisions are set out in the Addendum to this brief.

STATEMENT OF THE CASE

In this case, the Ninth Circuit adopted an extraordinarily expansive view of the notice requirements of the Fair Credit Reporting Act ("FCRA" or the "Act"), 15 U.S.C. § 1681 *et seq.*, ruling that an applicant for insurance must always be told that he has been treated "adverse[ly]" based on his credit report even when his credit score had no effect on his premiums, so long as the insurance company would have given him a better rate if he had a "perfect" credit score. The court then adopted an equally expansive and unprecedented view of FCRA's civil sanctions provision, holding that whenever a company acts pursuant to a statutory interpretation that is later deemed untenable, the company's conduct may be found "willfully" noncompliant, and thus subject to punitive and statutory damages. In combination, these holdings have produced an outcome that Congress certainly did not intend: an insurance company that adopted an eminently reasonable interpretation of FCRA's adverse-action notice

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[2] "Pet. App." refers to the Appendix to GEICO's petition for a writ of certiorari; "JA" refers to the Joint Appendix; "ER" refers to the Excerpts of the Record in the Ninth Circuit; and "SER" refers to the Supplemental Excerpts of the Record in the Ninth Circuit.

requirement—at a time when there was no authoritative judicial or agency guidance—may be held liable for hundreds of millions of dollars in statutory penalties to a nation-wide class of consumers who suffered no harm.

FACTUAL BACKGROUND

The Fair Credit Reporting Act. In 1970, Congress enacted FCRA "to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) (citing 15 U.S.C. § 1681(a)). The Act regulates both "consumer reporting agencies"—which produce "consumer reports," including credit reports—and the "users of consumer reports," like credit providers and the insurance companies here. *See* 15 U.S.C. §§ 1681a, 1681b, 1681m. Most importantly for present purposes, the Act requires users of consumer reports to notify a consumer when they have taken an "adverse action" against that consumer based on information contained in a credit report (or other consumer report) and inform the consumer that he has the right to review a free copy of the report. *Id.* § 1681m(a).

When FCRA was enacted, consumers typically "applied for credit that was available on a fixed set of terms and ... were either approved or denied on that same fixed set of terms." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 27 (2003) (testimony of J. Howard Beales, III, Dir., Bureau of Consumer Prot., U.S. Fed. Trade Comm'n) ("Beales Testimony"). Most creditors and insurance companies now offer varying terms depending on the risk an individual consumer presents. *Id.* at 28. The development of such risk-based pricing has led to a "much more differentiated pricing of credit and insurance products based on the risks that a particular consumer may pose." *Id.*

Credit Scores. The credit score is the foundation of modern risk-based pricing. *Fair Credit Reporting Act: How It Functions for Consumers and the Economy: Hearing*

Before the H. Subcomm. on Fin. Insts. and Consumer Credit of the Comm. on Fin. Servs., 108th Cong. 276 (2003) (testimony of Richard F. Le Febvre, On Behalf of AAA Am. Credit Bureau Inc.). Credit scoring involves the use of proprietary models that correlate the various information provided by credit reports with particular consumer behavior. Nat'l Consumer Law Center, *Fair Credit Reporting* 347 (5th ed. 2002). Although they were initially used to determine whether and on what terms to provide credit, FTC, *FTC Facts For Consumers: Credit Scoring* 1 (May 2006), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre24.pdf,[3] credit scores are now used for a variety of purposes, including underwriting insurance policies. Pauline Smale, Congressional Research Service, CRS Rep. No. RS21298, *Credit Scores: Dev., Use, and Policy Issues* at CRS-1 (June 4, 2004).

Credit scoring models do not rate a consumer's credit report as "good" or "bad," but instead rank each consumer numerically based on factors that correlate the information in the credit report with the credit, insurance, employment, or other decision at issue. Many aspects of a credit report are considered in calculating a credit score, including the consumer's credit history, credit exposure, and mix of various types of debt. ER 172. Because the credit score is not a report card, but is instead a model for predicting particular future behavior, even consumers whose credit reports reflect no late payments or other recognizably "negative" information may have only middling scores. For example, a sparse credit history may negatively affect a score. CRS Rep. No. RS21298 at CRS-3. Likewise, a high quantity of credit inquiries may have a negative impact on a score. *Id.* Credit scores generally range from a low of 300 (most risky) to a high of approximately 850 (least risky). Lamont D. Boyd, *Ins. Risk Scores: Forecasting Claim Performance Through the Use of Credit Data*, Today's Ins.

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[3] *See also* Pauline Smale, Congressional Research Service, CRS Rep. No. RS21298, *Credit Scores: Dev., Use, and Policy Issues* (June 4, 2004).

Professionals (Fall 2001).

GEICO and most insurers rely on a variant of the standard credit score "to help evaluate the risk of insurance applicants and policyholders." *Id.* These "insurance scores" are generally calculated based on the consumer's credit report using a model designed by Fair Isaac Corporation, which pioneered the commercial use of scoring systems. *Id.* Insurance scoring is a version of credit scoring that predicts applicants' insurance risks based on their credit history, and thereby allows insurers to price policies more efficiently based on each applicant's likely ratio of payouts-to-premiums (the "loss ratio"). *Id.*[4] For purposes of this brief, GEICO will use the generic term "credit score" when referring to all scores generated from credit-based consumer reports, including insurance scores.

Credit scores "are generally not used in isolation to set pricing or to deny insurance to an individual." Boyd, *Ins. Risk Scores.* To the contrary, an insurer will typically use its own proprietary underwriting system to consider the credit score along with other factors when analyzing the risks posed by a particular applicant for insurance. *Id.*; *Fair Credit Reporting Act: How It Functions for Consumers and the Econ.: Hearing Before the H. Subcomm. on Fin. Inst. and Consumer Credit of the Comm. on Fin. Services*, 108th Cong. 343 (2003) (testimony of Gregory V. Serio, Superintendent of Ins. N.Y., Dep't of Ins.). These other factors may include information such as driving history, age, gender, claims report and home condition. *Fair Credit Reporting Act: How It Functions for Consumers and the Econ.: Hearing Before the H. Subcomm. on Fin. Inst. and Consumer Credit of the Comm. on Fin. Services*, 108th Cong. 67 (statement of Wayne T. Brough, Chief Economist, Citizens for a Sound Economy).

The use of credit reports (and, derivatively, credit scores) in evaluating insurance applications and determining

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[4] *See also* Baird Webel, Congressional Research Service, CRS Rep. No. RS21341, *Credit Scores: Credit-Based Ins. Scores* (Jan. 19, 2005).

premiums is governed by state law. Most states now prohibit an insurer from using credit reports unless the insurer adopts a procedure that ensures that consumers with thin credit histories, and those for whom the reporting agency can find no information ("no-hits"), are not treated adversely as a result. These states expressly permit insurers to employ a mathematical factor that neutralizes the negative effect that such consumers' credit scores (or lack of credit scores) might otherwise have on their risk profiles.[5] The substitution of a neutral variable ensures that "the price of coverage to an insured with no credit history is neither increased nor decreased because of the credit history."[6] In some states, applicable laws have prohibited reliance upon credit reports altogether and thus effectively required insurers to "neutralize" all credit scores when evaluating the state residents' insurance applications. ER 165.

GEICO's Use of Credit Scores. GEICO provides automobile insurance through its four affiliated companies. GEICO General sells "preferred" automobile insurance to customers with low risk profiles. ER 114, 192. Government

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[5] *See, e.g.*, Alaska Stat. § 21.36.460; Ariz. Rev. Stat. § 20-2110; Ark. Code Ann. § 23-67-405; Colo. Rev. Stat. § 10-4-116; Fla. Stat. ch. 626.9741; Ga. Code Ann. § 33-24-91; 215 Ill. Comp. Stat. 157/20; Ind. Code Ann. § 27-2-21-16; Iowa Code § 515.109A; Kan. Stat. Ann. § 40-5104; La. Rev. Stat. Ann. § 22:1484; Mont. Code Ann. § 33-18-605; Neb. Rev. Stat. § 44-7705; Nev. Rev. Stat. § 686A.680; N.Y. Ins. Law § 2802; N.D. Cent. Code § 26.1-25.1-03; 36 Okla. Stat. tit. 36, § 953; Or. Rev. Stat. § 746.661; Tenn. Code Ann. § 56-5-402; Tex. Ins. Code § 559.052; Va. Code Ann. § 38.2-2234; South Carolina Insurance Department Bulletin 2002-04 (May 24, 2002); South Dakota Div. of Ins. Bulletin 2002-3 (Nov. 15, 2002). Many of these states, 26 or more in total, have adopted some version of the National Conference of Insurance Legislators' Model Act Regarding Use of Credit Information in Personal Insurance, which permits the use of neutral credit information to ensure that consumers with thin credit history, or no identified credit history, are not adversely treated.

[6] Comment of the National Association of Mutual Insurance Companies to the Federal Trade Commission, point 9 (Apr. 25, 2005), *available at* http://www.ftc.gov/os/comments/FACTA-implementscorestudy/514719-00088.pdf.

Employees also sells preferred automobile insurance, ER 114-15, but only to government employees or military personnel. JA 28 ¶ 17; JA 22 ¶ 18. GEICO Indemnity sells standard automobile insurance for moderate-risk customers. ER 115. And GEICO Casualty issues non-standard policies at generally higher rates for consumers who pose greater risks. Pet. App. 11a. A customer's insurance premium depends on the company and tier in which she is placed.

In 1998, GEICO prepared to begin using credit scores as part of its initial rate-quote process. It contracted with Trans Union and Fair Isaac to get access to their "proprietary statistical insurance scoring system," which "rank orders the consumer with respect to the insurance performance measured." ER 154. The contract does not give GEICO access to an applicant's actual credit report, but provides GEICO the credit score and up to four factors from the credit report that most influenced the score. *Id.*

In 1999, GEICO began using these credit scores as a factor—along with 14 other factors (JA 53-55)—in its initial underwriting decisions. JA 19 ¶ 3. The process worked as follows. When a potential customer called GEICO's toll-free number, a GEICO sales counselor would gather basic information and, with the customer's permission, obtain the customer's credit report information in the form of a credit score. ER 60 ¶ 3. GEICO's Computer-Assisted Underwriting ("CAU") system would then translate the score into a weighted factor and combine it with other underwriting factors to determine the customer's recommended company and tier placement. ER 60-61 ¶ 3.

Initially, when GEICO lacked the technical ability to identify whether credit information had adversely affected an applicant's placement or rate, GEICO sent FCRA adverse-action notices to all applicants who did not receive a policy with one of GEICO's two preferred companies, Government Employees or GEICO General. *Id.* As GEICO's Director of Underwriting Research has explained, "with the early system's development, we didn't have the ability to identify whether [the customers] were supposed to

receive an adverse action notice or not. So we sent it to more rather than fewer." SER 491, 504.

GEICO adopted the adverse-action notice methodology at issue in this case just a few months later, when Fair Isaac developed a method to neutralize an applicant's credit score. JA 19 ¶ 4. Using this methodology, the CAU system compared each applicant's company and tier placement with the company and tier placement the applicant would have received if GEICO had not considered his credit score and had relied solely on other underwriting factors. *Id.* The CAU system automatically generated an adverse-action notice whenever GEICO's consideration of the actual credit score resulted in the applicant's placement in a company or tier with higher premiums. *Id.* That way, GEICO was able to "identify and notify only those customers whose credit score has had a negative underwriting impact." SER 527.

Edo's Placement. In December 2000, Edo called GEICO for a rate quote on personal automobile insurance. Using the procedure described above, the CAU system considered Edo's credit score along with his other underwriting characteristics, and determined that Edo was eligible for a policy with the standard-rate company, GEICO Indemnity. *Id.* To determine whether Edo should receive an adverse-action notice, the CAU system then compared that result with the company and tier placement Edo would have received had his credit score not been considered. JA 21 ¶ 10. Edo's weighted credit score (62) was greater than the weight associated with a "neutral" credit report (56),[7] but not enough to improve his company or tier placement. Accordingly, the CAU system recognized that Edo would have paid the same premium regardless of whether his credit score was utilized, JA 26 ¶ 10; JA 21 ¶¶ 11, 12, and therefore determined that no adverse-action notice was required. Edo concedes that the "premium offered to [him] would have been the same had defendants not considered

[7] Mathematically, the "neutral weight" represents a "constant times the natural log of the [average] loss ratio ... plus a constant." ER 132.

his credit information." JA 31 ¶ 5. He was offered a policy with GEICO Indemnity, which he accepted. ER 61-62 ¶ 5.

PROCEDURAL HISTORY

Proceedings in the District Court. Edo alleges in this putative class action that GEICO violated § 615(a) of FCRA, 15 U.S.C. § 1681m(a), by failing to notify him of "adverse actions" it took against him based on his credit report. According to Edo, GEICO treated him "adverse[ly]" by failing to place him in one of its preferred-insurance companies or offer him as good a rate within GEICO Indemnity as he would have received if, instead of his actual middle-of-the-road credit score, he had the highest possible credit score. JA 9-12. Edo does not claim that he or any other class member suffered any actual harm from not receiving an adverse-action notice, JA 31, but he nonetheless seeks statutory damages of between $100 and $1000 per class member and attorneys' fees under § 1681n(a)—on the theory that, despite its elaborate procedure for compliance, GEICO *willfully* violated the statute's notice requirements. Until recently, Edo also sought punitive damages.[8]

On February 23, 2004, the district court granted GEICO's motion for summary judgment and dismissed Edo's claims against all of the GEICO defendants. Pet. App. 37a. The court concluded that GEICO Indemnity did not take any adverse action against Edo based on his credit information since "the premium rate that GEICO Indemnity offered to [Edo] would have been the same regardless of the information contained in [his] consumer credit history." Pet. App. 39a. The court dismissed Edo's claim against Government Employees for lack of standing because Edo was not a government employee or in the military, and therefore was "not eligible for insurance coverage from Government Employees regardless of his consumer score."

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[8] In a bid to avoid this Court's review, Edo dropped his claim for punitive damages the day that he filed his Brief in Opposition to GEICO's Petition for a Writ of Certiorari. *See* Resp. Br. in Opp. to Cert. at 7.

Pet. App. 44a. Relying on its previous decisions interpreting FCRA, the court dismissed Edo's claim against GEICO General, reasoning that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Pet. App. 45a. And, finally, the court dismissed Edo's claims against GEICO Casualty because GEICO Indemnity offered Edo a better insurance rate than he could have received had he been placed with GEICO Casualty. Pet. App. 46a-47a.[9]

The Ninth Circuit's First Opinion. On August 4, 2005, the Ninth Circuit, with one member of the panel dissenting, reversed the judgment of the district court. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005).[10] Purporting to rely on the "plain language" of FCRA § 1681m(a), and without adverting to the structure or history of the statute (or considering the practical consequences of its decision), the Ninth Circuit held that an insurer takes "adverse action" against a consumer based on information in a credit report "whenever [the] consumer pays a higher rate because his credit rating is less than the top potential score." *Id.* at 1109. Under this theory, the court held that all three remaining GEICO defendants took adverse action against Edo for which notice was required—GEICO Indemnity by charging a higher rate than Edo would have paid if he had a perfect credit score; GEICO General by not offering him coverage (which it would have provided if he had a perfect credit score); and Government Employees by making Edo's company and tier determinations on behalf of the other GEICO companies. *Id.* at 1111-13.

The Ninth Circuit next rejected GEICO's alternative

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[9] Edo did not appeal the district court's dismissal of his claim against GEICO Casualty.

[10] For the purposes of oral argument and its opinion, the Ninth Circuit consolidated this case with another, *Reynolds v. Hartford Financial Services Group, Inc., et al.*, No. 03-35695.

argument that, having interpreted FCRA's notice requirement reasonably in the absence of any authoritative interpretation of the statute, it cannot be said to have violated the Act *willfully*, and thus cannot be held liable under § 1681n(a) for statutory and punitive damages and attorneys' fees. Expressly disagreeing with other courts of appeals that have applied a "knowing" standard to this willfulness requirement, the Ninth Circuit adopted a "reckless disregard" standard, which it then equated with negligence: the court held that, because GEICO's (and the district court's) interpretation of FCRA's adverse-action notice requirement was "unreasonable," GEICO had "willfully" violated FCRA as a matter of law. *Id.* at 1113-16.

The Ninth Circuit's Second Opinion. In response to GEICO's petition for rehearing and rehearing *en banc*, the Ninth Circuit withdrew its first opinion and issued a second one. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 426 F.3d 1020 (9th Cir. 2005). The court did not change its holding that Edo had suffered an adverse action. Instead, the panel majority merely word-smithed the willfulness section of its opinion, replacing most references to GEICO's "unreasonable" interpretation of the Act with similar adjectives like "implausible" and "untenable." *Id.* at 1036-40. The panel majority stood by its holding that GEICO's interpretation of the Act's adverse-action notice requirements was so unreasonable that it established GEICO's willfulness as a matter of law. *Id.*

The Ninth Circuit's Third Opinion. In response to GEICO's first amended petition for rehearing and rehearing *en banc*, the Ninth Circuit withdrew its second opinion, and issued a third and ultimately final opinion. Pet. App. 1a. As in the first two versions, this opinion held that GEICO violated § 1681m(a) by failing to send Edo an adverse-action notice. Pet. App. 20a-21a. This time, however, the panel remanded the case for the district court to consider whether GEICO's violation was willful. Pet. App. 34a. But the panel instructed the district court that GEICO may be found to have acted with reckless disregard and thereby willfully if it

relied on an "[un]tenable," "creative," "unreasonable[]," or "implausible" interpretation of the Act. *Id.*

On April 20, 2006, the Ninth Circuit denied GEICO's second amended petition for rehearing and rehearing *en banc*.

Further Proceedings in the District Court. On remand, the district court has observed that, if this Court affirms the Ninth Circuit's holding that GEICO violated FCRA's notice requirement, "[t]he issue of willfulness will almost certainly remain in the case regardless of the Supreme Court's determination of the [willfulness] standard to be applied. As long as willfulness remains an issue, advice of counsel will likely remain a defense and otherwise privileged attorney-client materials will be discoverable." *See* October 5, 2006 Order Granting Stay at 9; *see also* September 13, 2006 Order Denying Motion for Protective Order at 5.

SUMMARY OF ARGUMENT

I. The Ninth Circuit held that, under FCRA, millions of insurance applicants must be sent notices informing them that they have been treated "adverse[ly]" based on information in their credit reports even though their credit reports did not actually worsen (and in many cases, actually improved) their insurance premiums. In attributing this peculiar intention to Congress, the Ninth Circuit ignored the actual impact that consideration of an applicant's credit report had on his premiums and focused instead on whether the applicant would have received an even better rate if he had the highest possible credit score. Under this standard, an applicant whose credit report was so favorable that it lowered his insurance premiums would nonetheless be deemed to have been treated adversely based on that credit report so long as he could have gotten an even better rate if he had the most extensive and pristine credit history imaginable. The text of § 1681m(a), which asks whether a consumer has been treated "adversely ... on the basis of" his credit report information does not support that perverse outcome.

There is also no suggestion in the legislative record that Congress contemplated the Ninth Circuit's peculiar conception of adversity at FCRA's enactment. And in 1996 when Congress first addressed the development of differentiated pricing based on credit reports ("risk-based pricing"), it affirmatively rejected the Ninth's Circuit's view of "adverse action." The legislative history of the 1996 FCRA amendments makes clear that the use of credit reports in deciding whether to make offers to existing customers and prescreened candidates does not trigger a requirement to send adverse-action notices to consumers receiving such offers *even if other consumers were offered better rates based on superior credit.* More recent amendments from 2003 that expressly address *credit providers'* use of risk-based pricing also militate against the Ninth Circuit's position by demonstrating that Congress did not view all price variations triggered by credit scores to be "adverse action."

Despite the Ninth Circuit's assertions to the contrary, its interpretation of the adverse-action notice requirement also frustrates rather than furthers the purpose of the Act. Because few consumers have the extensive credit histories required to warrant the highest possible credit scores, the Ninth Circuit's standard would dramatically increase the number of consumers receiving adverse-action notices—and that increase would consist entirely of consumers who benefited from or were unaffected by their credit reports. The byproducts of this heavy-handed approach would be confusion and apathy. Congress designed the adverse-action provisions of FCRA to alert consumers when negative information in their credit reports produces real-life adverse consequences. The Ninth Circuit's approach would thwart this purpose entirely.

II. In holding that GEICO's approach was not only incorrect but potentially "willful" under § 1681n(a), the Ninth Circuit invented a novel and confused definition of that term that exposes GEICO and other companies to potentially crushing punitive sanctions for merely adopting

an interpretation of FCRA with which a court later disagrees.

Though "willful" has been given diverse meanings depending on its context, the most natural reading of the term as used in FCRA is the intentional violation of a known legal duty. In criminal statutes, such as FCRA's criminal provisions, "willfully" is typically read to require a specific intent to violate the law. Applying the canon that a word should be interpreted consistently throughout a statute, "willfully" is also best read in § 1681n(a) to connote knowledge. This conclusion is further supported by the Act's other civil liability provisions and drafting history, which suggest that Congress intended "willfully" to mean something more than just reckless disregard. And finally, interpreting the provision's *mens rea* to require anything less than a knowing violation would raise serious constitutional concerns given the massive uncapped and aggregated punitive and statutory damages authorized by the Act without any need to prove actual harm.

Even if "willfully" were read to mean reckless disregard, moreover, the Ninth Circuit's articulation is not true to that standard. In the Ninth Circuit's view, where an insurer's interpretation is later deemed "implausible," "untenable," "creative" or "unreasonable," even the company's good faith reliance on counsel might not be sufficient to disprove willfulness and escape punitive sanctions. The Ninth Circuit's confusing use of these varying terms blurs the line between negligence and willfulness, ignores the established test for objective recklessness (whether the defendant's interpretation lacked any legal foundation), and erroneously suggests that a flawed statutory construction can make proof of bad faith unnecessary.

Of course, these doctrinal flaws in the Ninth Circuit's opinion are important here only because the court failed to recognize that GEICO's interpretation of FCRA's adverse action provisions was objectively reasonable. The objective merits of GEICO's interpretation on its own terms, the complete lack of prior judicial or administrative authority,

the multitude and diversity of alternative interpretations, and the fact that the federal district judge *agreed* with GEICO's position establish its reasonableness—and thus the absence of willful misconduct—as a matter of law.

ARGUMENT

I. AN INSURER DOES NOT TAKE AN ADVERSE ACTION BASED ON INFORMATION IN A CONSUMER REPORT JUST BY FAILING TO TREAT THE CONSUMER AS IF HE HAD THE HIGHEST POTENTIAL CREDIT SCORE

Under FCRA, "users of consumer reports" must provide notice to consumers if they "take[] any adverse action with respect to any consumer that is based in whole on in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a). FCRA defines "adverse action" slightly differently depending on the purpose for which the consumer report is used. Most importantly for present purposes, the statute provides that "adverse action ... means a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i).[11]

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[11] In the credit context, adverse action "has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act" (15 U.S.C. § 1681a(k)(1)(A)), *i.e.*, "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit." 15 U.S.C. § 1691(d)(6). In the employment context, adverse action means "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." 15 U.S.C. § 1681a(k)(1)(B)(ii). For governmental uses, adverse action means "a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit." 15 U.S.C. § 1681a(k)(B)(iii). And for other permissible uses of consumer reports where the consumer has made

The Ninth Circuit interpreted this language to mean that an insurer must notify a consumer that it has taken adverse action against him based on information in his credit report "whenever [the] consumer pays a higher rate *because his credit rating is less than the top potential score.*" Pet. App. 20a-21a (emphasis added). That is hardly the most natural reading of the text and it finds no support in FCRA's structure, legislative history or purpose.

A. The Ninth Circuit's Interpretation Departs From The Text By Classifying Neutral And Even Favorable Treatment As Adverse

The core problem with the Ninth Circuit's holding is that, instead of evaluating the actual impact of a consumer's credit information on that consumer's insurance rate, it compares the rate offered to the consumer with the rate he would have been offered if he had the best credit profile imaginable. The Ninth Circuit ruled that a consumer who benefited from consideration of his credit report must nonetheless be told he was treated adversely based on his credit report if he would have received an even better rate with the most pristine and extensive credit history imaginable. This peculiar understanding of "adverse action" is surely not what Congress had in mind.

The starting point for interpreting any statute is of course its text. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). Here, the text has some ambiguity because FCRA's adverse-action notice provision does not expressly provide the benchmark of "neutral action" against which "adverse action" is to be measured. That ambiguity explains why some insurers (such as Safeco) believed the notice requirements applied only to changes made to existing policies or rate quotes, and not to initial rate quotes. But regardless of how that ambiguity is resolved, nothing in the

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an application or initiated a transaction, such as a landlord's review of a consumer's application for an apartment, or where a consumer report is considered in connection with a review of existing accounts, adverse action occurs when the user takes action or makes a determination that is "adverse to the interests of the consumer." 15 U.S.C. § 1681a(k)(1)(B)(iv).

text suggests that the premium that would have been offered someone with the highest possible credit score is the appropriate benchmark for adverse action.

The Ninth Circuit's holding to that effect ignores the ordinary meaning of "adverse" as "acting against or in opposition to, opposing, contrary, antagonistic, actively hostile ... hence, unfavourable, hurtful, detrimental, injurious, calamitous, afflictive." *Oxford English Dictionary* 189 (2d ed. 1989). As a matter of plain language, a consumer has not been treated "adversely" as a result of information in her credit report when in fact she was not affected or was even benefited by the insurer's consideration of her credit score.

The Ninth Circuit's approach also ignores the relevant statutory definition of adverse action as a "denial or cancellation of, an increase in any change for, or a reduction or other *adverse or unfavorable change in the terms of coverage or amount of, any insurance.*" 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). The word "change" of course requires comparison to a referent or benchmark not expressly provided by the statute. The most natural reading of that term might be a "change" from the existing or quoted terms or rate (Safeco's approach) or perhaps from the terms or rate that would have applied absent consideration of the consumer's credit report (GEICO's approach). While it also may be linguistically possible to speak of a "change" from the hypothetical terms or rate that would have applied if the consumer had the best conceivable credit score, that would certainly be an odd and unconventional reading. Thus, even assuming that an initial insurance application can lead to an "increase in [a] charge" or other "unfavorable change in the terms of coverage" and thus an adverse action, *but see* Brief of Safeco at 37-40, GEICO should not be faulted for failing to inform Edo that it treated him adversely based on *his* credit score because he could have gotten a better rate or terms if he had the best possible credit score.

Edo's own facts demonstrate the fallacy of the Ninth

Circuit's approach, but it is easy to conceive of even more dramatic illustrations. For instance, assume that Adam and Bob have identical above-average—but not the absolute best—credit profiles. Assume further that Adam lives in a state that permits the use of credit reports in insurance underwriting while Bob does not. All other things being equal, if both apply for insurance with the same company, Adam may receive a better insurance rate than Bob because the consideration of Adam's above-average credit score may favorably impact his rate. Yet under the Ninth Circuit's interpretation, the insurance company must notify Adam that he has suffered an "adverse action" based on its consideration of information in his credit report, even if he is receiving a *better* rate than he would have received had his credit information *not* been considered (i.e., Bob's rate).

This perverse outcome is rooted in the Ninth Circuit's desire to graft into the definition of adverse action a comparison between the consumer's actual credit report and the credit report of a hypothetically perfect consumer. This judicial gloss strains the statutory language to its breaking point. *See Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 462-63 (1987) (rejecting construction of statute that would depend upon the addition of words, rather than construction of the plain terms of the statute).

Under GEICO's more natural reading of the text, an insurer takes an "adverse action" against a consumer "based on" information in a consumer report only when, but for consideration of the report, the insurer would have treated the consumer more favorably. The comparison contemplated by this language focuses on the real-world impact of the insurer's consideration of the *actual consumer's* information, not on the hypothetical treatment of a make-believe super-consumer. Because GEICO placed Edo in precisely the same company and tier for which he would have qualified had his credit not been considered at all, GEICO properly concluded it had taken no adverse action against Edo "based on" information in his consumer report and properly declined to send him an adverse-action

notice.

B. FCRA's Structure And Legislative History Casts Additional Doubt On The Ninth Circuit's Interpretation Of Adverse Action

As enacted in 1970, FCRA's adverse-action provision read, in relevant part, as follows:

> Whenever credit or insurance ... is denied ... or the charge for such credit or insurance is increased either wholly or partly because of information in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action is taken.

Pub. L. No. 91-508, § 615(a), 84 Stat. 1114, 1133 (Oct. 26, 1970). Prior to the district court's rulings, no court or agency authoritatively interpreted that language, and the legislative history of the 1970 enactment sheds no additional light on its meaning.

1996 Amendments. In 1996, FCRA's adverse-action notice provision was split into two separate subsections—one stating the notification requirement and the other providing distinct, industry-specific definitions of "adverse action." S. Rep. No. 104-185, at 32 (1995). The 1996 amendments did not substantively alter either the relevant definition of adverse action (which still included "denial[s]" and "increase[s] in any charge for ... insurance") or the need for a causal link between the adverse action and the use of the consumer report ("because of information in a consumer report" became "based ... on any information contained in a consumer report"). *Compare* Pub. L. No. 91-508, § 615(a), 84 Stat. at 1133, *with* Pub. L. No. 104-208, §§ 2402, 2411, 110 Stat. 3009, 3009-426 to 3009-430, 3009-443 to 3009-446 (1996). To the extent that an "increase[]" in the consumer's "charge for ... insurance" did not initially encompass quoting a premium higher than the lowest possible rate, nothing in the 1996 amendments introduced that concept into the statute.

In other contemporaneous amendments to FCRA,

moreover, Congress expressly disavowed that conception of adverse action. For example, when Congress amended § 1681a(l) to permit credit and insurance companies to use consumer report information when prescreening individuals for offers of preferred products or rates to select consumers, *see* Pub. L. No. 104-208, § 2404, 110 Stat. at 3009-431, the Senate Report explained that companies may use consumer reports in making such offers *without triggering notice obligations to other potential customers who do not receive the offer*. "[F]ailure to include a consumer in a prescreening solicitation does not constitute adverse action." S. Rep. No. 104-185, at 32.

The 1996 amendments also permitted companies to use consumer reports in their reviews of existing customer accounts. *See* § 1681a(m). The Senate Report clarifies that a decision to improve the rate or terms provided to an existing customer is not an "adverse action" *even if the accounts of other existing customers are changed in a more favorable manner*. *See* S. Rep. No. 104-185, at 32 (discussing 15 U.S.C. § 1681a(m)).

Congress's treatment of prescreened offers and account reviews of existing customers cannot be squared with the Ninth Circuit's view of initial insurance applications. Had Edo been an existing customer, GEICO's failure to lower his premium based on a review of his credit report would not have amounted to an "adverse action," regardless of whether GEICO lowered the premiums of other similarly situated customers with better credit scores. Nor would a prescreened offer to Edo at a preferred rate have constituted an "adverse action," even if Edo would have received a better rate with perfect credit. There is no reason that the exact same offer, made in response to Edo's initial application, should amount to an adverse action. The Ninth Circuit erred by failing to reconcile its construction of the Act respecting initial applicants with Congress's treatment of similarly situated prescreened consumers and existing customers.

Congress's definition of adverse action by credit

providers, incorporating the definition in § 701(d)(6) of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691(d)(6), casts further doubt on the Ninth Circuit's interpretation. *See* 15 U.S.C. § 1681a(k)(1)(A). At the time of the 1996 amendments, the Federal Reserve Board had already promulgated legislative regulations under ECOA, which do *not* require an adverse-action notice whenever the consumer would have gotten a better rate if he had the "best possible credit score." To the contrary, the regulations provide that no adverse action occurs if a consumer applies for credit at certain terms, the creditor counteroffers with different terms, and the consumer accepts the counteroffer. *See* 12 C.F.R. § 202.2. Under the Ninth Circuit's view, Congress's incorporation of this definition of "adverse action" must have been a purposeful decision to decrease the adverse-action notice obligations of credit providers while maintaining more rigorous responsibilities for insurance companies and employers. Nothing in the legislative history supports that interpretation.

2003 Amendments. More recent legislation, post-dating the events in this case, also highlights the error in the Ninth Circuit's use of a "best possible credit score" benchmark for defining adverse action. In the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Congress amended FCRA to require only creditors (not insurers) to provide a "risk-based-pricing notice" to a consumer whenever the use of her credit report information results in an offer of credit with "material terms that are materially less favorable than the most favorable terms available to a substantial proportion of [that creditor's] consumers."[12] Unlike § 1681m(a), this new provision (codified at 15 U.S.C. § 1681m(h)(1)) expressly applies to initial offers and specifies the benchmark against which a creditor must measure the effect that its use of credit information had on an offer.

This 2003 amendment is relevant to the present issue in

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[12] *See* Pub. L. No. 108-159, § 311, 117 Stat. 1952 (2003).

three respects. First, it makes clear Congress's ability to require notification in some circumstances where, even though consideration of the credit report did not harm the consumer, a better credit report would have improved his rate. But Congress imposed that risk-based pricing notice requirement only on credit providers, and that choice is presumed to be deliberate. *See Duncan v. Walker*, 533 U.S. 167, 173 (2001).

Second, the 2003 amendment shows that even when Congress focused on risk-based pricing, it did not go as far as the Ninth Circuit did here. Instead of requiring a notice every time a consumer would have gotten better terms with perfect credit, the amendment requires a notice only when the consumer's terms are "materially less favorable than the most favorable terms available to a substantial proportion" of other applicants. 15 U.S.C. § 1681m(h)(1).

Third, the 2003 amendment reveals that Congress has not equated risk-based pricing notices with adverse-action notices. Rather than incorporate the new risk-based pricing notice requirement into § 1681m(a)'s adverse-action notice provision, Congress codified it in a new section, § 1681m(h). Nothing in the text or history of this new provision suggests that Congress considered a creditor's offer an "adverse action" just because its terms were materially less favorable than those available to a "substantial proportion of consumers." Yet the standard announced by the Ninth Circuit deems that same conduct (and conduct even more innocuous) "adverse" in the insurance context. This makes no sense. If being treated worse than a substantial proportion of consumers is not an adverse action, then being treated the same as or better than most is not either. Conduct that, in the credit context, would not even trigger a notice that risk has been considered in pricing should not in the insurance context trigger a notice that the consumer has been treated adversely.

In sum, the Ninth Circuit's approach, already in tension with the plain language of § 1681m(a), is also at odds with FCRA's structure and legislative history. GEICO's

position—that Congress intended adverse action to be determined by reference to the actual impact of a consumer's credit information on the consumer's rates or terms—is a far more reasonable interpretation of the statute, read as a whole.

C. Adoption Of The Ninth Circuit's Standard Would Frustrate The Purpose Of The Notification Requirement

The Ninth Circuit's holding requires an insurance company to send an "adverse action" notice to every consumer, regardless of how good his credit score is or how positively it impacted his rate, whenever a better credit score would have lowered his premiums. In the Ninth Circuit's view, this approach would improve consumer welfare, because more frequent notices will cause more consumers to confirm the accuracy of their credit reports and appreciate the importance of maintaining good credit. Pet. App. 18a. That policy decision is of course not the Ninth Circuit's to make, but, in any event, adoption of its expansive notice rule would likely do more harm than good. Whereas Congress designed the notification requirement surgically to require notices at a time when the information in a consumer's credit report has adversely affected him—a moment when he will be particularly inclined to review the credit report and correct any errors in it—the Ninth Circuit's rule would make the notices so ubiquitous and the concept of "adverse action" so meaningless that the notices become useless, or even affirmatively confusing.

Certainly, by requiring insurers to send adverse-action notices to all but the very most creditworthy consumers, the Ninth Circuit's interpretation would dramatically increase the volume of notices. *See* Brief of Financial Services Roundtable at 29 (estimating that the Ninth Circuit's holding will require businesses to produce and send "tens or hundreds of millions of additional adverse action notices each year"). But contrary to the Ninth's Circuit's view, that result is not unequivocally in the consumer's best interests, because this vast expansion of the scope of the notice

provision would diminish the utility of the notices themselves. "*Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure ... and the need to avoid ... [informational overload].'" *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (citation omitted) (discussing disclosures required by the Truth in Lending Act) (alterations in original).[13]

As the FTC has acknowledged in testimony before Congress, "if you give notices too widely and in too many circumstances ... it becomes something people ignore." Beales Testimony at 95-96. Indeed, the FTC specifically cautioned Congress that it was crucial "to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 529 (2003) (testimony of Joel Winston, Associate Director, Fin. Practices Div., Bureau of Consumer Protection, Federal Trade Comm'n). The Ninth Circuit's more-the-merrier policy view completely ignores these ramifications.

Nor is the only problem with the Ninth Circuit's rule the "white noise" that would be generated by this mass proliferation of notices. As envisioned by Congress, the notices are supposed to alert consumers to information in their credit reports that has adversely affected their interests. Yet under the Ninth Circuit's approach, consumers will receive adverse-action notices even when

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[13] The Ninth Circuit also contended that, even where credit reports prove accurate, requiring extensive adverse-action notices serves an important educational goal. Pet. App. 18a. But Congress addressed that goal in a different provision, *see* 15 U.S.C. § 1681j, which gives all consumers an annual right to a free copy of their reports. Particularly in light of that provision, § 1681m(a) cannot reasonably be read to require users of consumer reports to send adverse-action notices to consumers *not* adversely affected simply to educate them about the virtues of checking their credit reports.

their insurance rates are unaffected—or even improved—by consideration of their credit scores. Even apart from the conceptual absurdity of sending an "adverse action" notice in this situation, the requirement poses serious practical problems for insurers charged with drafting such notices and consumers trying to understand them.

According to the Ninth Circuit, the notice must communicate that the consumer has experienced an adverse action, describe the action and specify why the action was adverse. *See* Pet. App. 24a. Compliance with this requirement where the consumer has above-average but not perfect credit would require almost metaphysical abstraction. Essentially, the notice would have to inform the consumer that she has been treated adversely as a result of a consumer report that favorably impacted her insurance rate. One commentator has suggested the following formulation:

> Dear Insurance Applicant: Due to your favorable credit history, we are able to offer you a premium that is considerably lower than the premium we would have charged had you not had such a favorable credit history. That said, your credit is not quite good enough to qualify for our very lowest rate. Therefore, our offer of a substantial premium discount based on your excellent credit history constitutes an adverse action against you by us.[14]

Regardless whether this makes sense to the Ninth Circuit, it will certainly confuse many consumers. And further inquiry by the consumer—which the Act is designed to encourage—may only exacerbate the problem, since having less than a perfect credit score will often have nothing to do with anything affirmatively "bad" (such as late payments) in

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[14] Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable*, Wash. Legal Found. Backgrounder, at 3 n.3 (Jan. 27, 2006), *available at* http://www.wlf.org/upload/012706LBDetlefsen.pdf.

a credit report. Credit scores can be affected by such innocuous factors as having too few or too many outstanding accounts, having too short a credit history, having too little or too much debt, or having too high a ratio of revolving to fixed loans. *See* CRS Rep. No. RS21298 at CRS-3; Brief of Consumer Data Industry Association ("CDIA"), at 23-24 (explaining that even consumers with "unblemished credit history[ies]" containing "no derogatory information" will not have the top potential credit score).[15]

Nor does this situation much improve if the requisite notice merely informs the consumer that the insurer considered credit report information in its underwriting decision. *See* 15 U.S.C. § 1681m(a) (apparently requiring no more than that). Such a notice might be less confusing, because it would not label beneficial action "adverse," but it would not be much more meaningful. When (as here) consideration of the credit report did not affect the consumer's rate or terms of service, few consumers would learn anything of consequence from the disclosure or feel any need to follow up. The ubiquity and innocuous nature of such notices would render them largely meaningless.

The Ninth Circuit's contrary view appears to be grounded in its fundamentally mistaken assumption that the credit reports of consumers with less than perfect credit scores must contain "bad" information about which consumers would want to be notified. As explained above, even consumers who have always paid their bills timely will almost never have perfect credit scores simply because they do not have the most extensive credit histories imaginable. It is doubtful that Congress, which codified the notice requirement to deal with adverse actions based on "information *contained* in a credit report," intended to highlight most consumers' failure to obtain the very best possible rates because of an *absence* of extraordinarily positive information in their credit reports. The Ninth Circuit's reading would in many cases render the notice

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[15] *See also Credit Scoring* at 2-3; *Fair Credit Reporting* at 351-53.

requirement absurd and disserve the statute's core purpose.

II. GEICO'S REASONABLE COMPLIANCE POLICY WAS NOT A "WILLFUL" VIOLATION OF THE ACT

The Ninth Circuit held that, even in the absence of actual damages, violation of any of FCRA's myriad and technical requirements based on an unreasonable, untenable, implausible, or creative interpretation of the Act can expose a company to potentially crippling punitive and statutory damages. Nothing in the text, structure, or history of the Act suggests that Congress intended such a draconian result.

FCRA has two separate civil damages provisions. Section 1681o assesses actual damages against "[a]ny person who is negligent in failing to comply with any requirement" of the Act. 15 U.S.C. § 1681o(a). Section 1681n addresses violations committed with greater *mens rea*. It provides that, even in the absence of actual damages, "[a]ny person who willfully fails to comply with any requirement" of the Act is liable for statutory damages between $100 and $1,000 (in lieu of actual damages) and punitive damages. 15 U.S.C. § 1681n(a). Because Edo claims no actual damages, his suit relies entirely on § 1681n and thus requires proof not only that GEICO's notice practices violated the Act's adverse-action notification requirements, but also that GEICO's violation was willful.

As this Court has observed, "willful" is "'a word of many meanings.'" *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citing *Spies v. United States*, 317 U.S. 492, 497 (1943)). Yet the Ninth Circuit's interpretation comports with none of them. In defining the term within the context of FCRA, the Ninth Circuit diverged from at least five other circuit courts that have concluded that willfulness requires proof of actual knowledge that the defendant's conduct violated the Act.[16]

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[16] *See Phillips v. Grendahl*, 312 F.3d 357, 364, 370 (8th Cir. 2002) ("[W]illful noncompliance under section 1681n requires knowing and intentional commission of an act *the defendant knows to violate the law*.") (emphasis added); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834

The Ninth Circuit also departed from (even as it purported to apply) the Third Circuit's standard, which requires, at a minimum, proof of reckless disregard of the law.[17] Instead, the Ninth Circuit held that a company's conduct may be found willful—and thereby a springboard for crushing punitive sanctions— based on nothing more than simple negligence, or even just an incorrect interpretation of FCRA's complex provisions. That idiosyncratic approach cannot be reconciled with the text, structure or history of the Act.

Ultimately, regardless of whether the standard for willfulness is knowledge or reckless disregard, the district court's judgment in this case should have been affirmed as a matter of law. Because GEICO's interpretation of FCRA's adverse-action notice requirement was eminently reasonable, and therefore not even negligent, GEICO cannot be found to have violated the Act willfully under any conception of that term.

(7th Cir. 2004) ("To act willfully, a defendant must knowingly and intentionally violate the Act, and *it 'must also be conscious* that [its] act impinges on the rights of others.'") (quoting *Phillips*, 312 F.3d at 368) (emphasis added); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) ("[T]he defendants cannot be held civilly liable [for willful noncompliance] if they obtained the [plaintiffs'] reports 'under what is believed to be a proper purpose under the statute but which a court ... later rules to be impermissible legally under § 1681b.'") (citation omitted); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293-94 (5th Cir. 1993) (holding that to establish willful noncompliance the evidence must reveal a "conscious disregard" and an "intention to thwart consciously" a person's rights under FCRA; stating that "[o]nly defendants who engaged in 'willful misrepresentations or concealments' have committed a willful violation"); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 417-18 (4th Cir. 2001) (relying on the Fifth Circuit's "conscious disregard" standard; concluding that there was insufficient evidence of willfulness because the defendant did not possess the required "state of mind" and was not "aware").

[17] *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).

A. "Willfully" In § 1681n(a) Requires, At A Minimum, An Intentional Violation Of A Known Legal Duty

As its root suggests, the term "willful" denotes the exercise of will. It refers to acts done intentionally, knowingly, purposely, or with an evil heart, as opposed to acts done carelessly or inadvertently. *Black's Law Dictionary* 1599 (6th ed. 1990).[18] That much is clear. The ambiguity lies in whether a statute proscribing a willful violation requires proof of at least knowing misconduct or instead merely reckless disregard. This Court has answered that question differently depending on the nature, structure, history and purpose of the particular statute at issue. It has frankly observed that the meaning of "willful" depends entirely on its statutory context. *See, e.g., Bryan,* 524 U.S. at 191; *Ratzlaf v. United States,* 510 U.S. 135, 141 (1994).

In the context of § 1681n(a), willfulness is best understood to require at least a knowing violation of the Act. That reading best harmonizes the Act's use of a willfulness element in its criminal enforcement provision, best reconciles the varying levels of *mens rea* used in the Act's various civil and administrative enforcement provisions, is most consistent with the Act's legislative history, and takes account of the grave constitutional doubts that would accompany a statutory scheme that permitted uncapped and potentially crushing punitive and statutory damages for merely reckless conduct without any showing of actual harm.

1. The Language, Structure And Legislative History of FCRA Confirm That Congress Intended "Willfully" In § 1681n(a) To Require, At A Minimum, Proof Of Actual Knowledge

Congress' Use of the Same "Willful" Standard In The Act's Criminal Enforcement Provisions Indicates A

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[18] *See, e.g., Cheek v. United States,* 498 U.S. 192, 200 (1991); *United States v. Bishop,* 412 U.S. 346, 360 (1973).

***Mens Rea* Greater Than Mere Recklessness.** For more than 60 years, whenever willfulness has been an element of a criminal offense, this Court has read the term to require a showing that the defendant deliberately took an action that he knew violated the law.[19] Although the meaning of "willfully" in any particular criminal statute must nonetheless be determined holistically, taking into account all relevant factors, *Dolan v. U.S. Postal Serv*, 126 S. Ct. 1252, 1257 (2006), this long line of cases strongly suggests that, absent a contrary indication in the text, structure or history of a statute, Congress is presumed to have anticipated specific intent when it requires proof of willfulness as an element of a crime.

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[19] *See Bryan*, 524 U.S. at 196 (concluding that "willfully" dealing in firearms without a federal license requires "knowledge that the conduct is unlawful"); *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006) (applying *Bryan* to "willfully" receiving a firearm while under indictment); *Ratzlaf*, 510 U.S. at 137 ("To establish that a defendant 'willfully violated' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful."); *Cheek*, 498 U.S. at 201 (concluding that the willfulness requirement within the tax code required the "'voluntary, intentional violation of a known legal duty'" (citation omitted)); *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (same); *United States v. Bishop*, 412 U.S. 346, 360 (1973) (same); *James v. United States*, 366 U.S. 213, 221 (1961) (stating that "willfully" failing to account for tax or "willfully" attempting to evade tax obligations "'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income'" (quoting *Holland v. United States*, 348 U.S. 121, 139 (1954)); *Heikkinen v. United States*, 355 U.S. 273, 279 (1958) ("There can be no *willful* failure by a deportee ... to apply to, and identify, a country willing to receive him in the absence of evidence, or an inference permissible under the statute, of a 'bad purpose' or 'non-justifiable excuse,' or the like."). In cases involving civil statutes with limited punitive effect, the Court has sometimes required less. *See, e.g., McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (concluding that a "reckless disregard standard" was appropriate for the Fair Labor Standards Act); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985) (applying a reckless disregard standard in the context of the Age Discrimination in Employment Act). *But see Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (interpreting "willful" to require knowledge in the context of a civil provision of the Bankruptcy Act).

That background is important here because in FCRA Congress made proof of a "willful" violation the sole gateway to both the punitive and statutory damages of § 1681n(a) and the criminal penalties prescribed by §§ 1681q and 1681r. These criminal enforcement provisions proscribe "knowing[] and willful[]" violations of the Act, a formulation in which the term "willful" ordinarily requires a specific intent to violate the law. For example, in *Felton v. United States*, 96 U.S. (6 Otto) 699, 702 (1878), a defendant was charged and convicted of "knowingly and willfully" failing to properly maintain pipes in a distillery in accordance with the law. This Court reversed, holding that the phrase required particularly blameworthy conduct: "Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it." *Id.* As the Court has explained in more recent cases, "knowingly" often refers to "'knowledge of the facts that constitute the offense,'" while "willfully" requires a defendant to have "'acted with knowledge that his conduct was unlawful.'" *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006) (quoting *Bryan*, 524 U.S. at 193).

The text of § 1681q, in particular, strongly supports that traditional interpretation. Section 1681q prohibits persons from "knowingly and willfully obtain[ing] information on a consumer from a consumer reporting agency under false pretenses." This proscription makes perfect sense if "knowingly" requires knowledge of the underlying conduct and "willfully" requires proof of a deliberate means or bad-purpose in the use of false pretenses. But the provision would make no sense whatever if "willful[]" meant merely reckless disregard—for a person cannot knowingly and recklessly act under false pretenses.

The Ninth Circuit acknowledged that "actual knowledge of illegality is required for a willful violation of a criminal statute," Pet. App. 32a, but it failed to appreciate that Congress's use in FCRA's criminal provisions of such a willfulness standard strongly suggests that Congress meant

"actual knowledge of illegality" in § 1681n(a) as well. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf*, 510 U.S. at 143 (interpreting "willfully" throughout the statute to require knowledge that conduct was unlawful). And this interpretative principle loses none of its force where the words in question span criminal and civil provisions. This Court has frequently employed this principle to ensure consistency in statutes that utilize the same language in their criminal and civil enforcement provisions. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (statutory term used in both criminal and civil provisions must be interpreted consistently regardless of whether "we encounter its application in a criminal or noncriminal context").[20]

Indeed, the canon that identical terms used in a statute's criminal and civil provisions share the same meaning should apply with even greater force here, because the "quasi-criminal" nature of the punitive and statutory damages authorized by § 1681n(a) makes it particularly likely that Congress intended "willfully" to have the same meaning across FCRA's criminal and civil provisions. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (describing punitive damages as a "quasi-criminal" penalty and a reflection of a jury's "moral condemnation"). The same level of *mens rea*—at a minimum, knowledge of illegality—required to establish a criminal violation of FCRA should be required to establish civil liability under § 1681n(a).

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[20] *See also Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1167 (3d Cir. 1980) (holding that where the term is used both criminally and civilly, "conduct more culpable than is generally required in the usual civil context is the minimum that Congress intended to be within the meaning of the term willful" in the civil context); *Bethlehem Steel Corp. v. OSHRC*, 540 F.2d 157, 161 (3d Cir. 1976) ("The genesis of 'willfully' in a criminal provision strongly suggests that it was originally meant to require a strong showing of intent.").

The Structure Of § 1681n Suggests That Congress Intended The Term "Willfully" In Subsection (a) To Require, At A Minimum, Proof Of A Knowing Violation Of The Act. The overall structure of § 1681n casts further doubt on the Ninth Circuit's view that "willfully" in subsection (a) means only reckless disregard. First, while subsection (a) generally proscribes "willfully fail[ing] to comply" with the Act, its subpart (a)(1)(B) prohibits a particular form of willful noncompliance—"obtaining a consumer report ... knowingly without a permissible purpose." A "willful[] fail[ure] to comply with [the statute]" (15 U.S.C. § 1681n(a)) must therefore subsume actions done "knowingly without a permissible purpose" (15 U.S.C. § 1681n(a)(1)(B)), since the former set encapsulates the latter. That framework makes sense if willful means "with an evil heart." Yet it makes no sense under the Ninth Circuit's interpretation, because a person cannot with *reckless disregard* "knowingly obtain a consumer report without a permissible purpose."

Second, § 1681n(b) provides statutory damages of $1000, but no punitive damages, for suits by consumer reporting agencies against any person "who obtains a consumer report ... knowingly without a permissible purpose." As a matter of plain language, *willfully* "obtain[ing] a consumer report ... knowingly without a permissible purpose" (the conduct proscribed by § 1681n(a)(1)(B)) describes a state of culpability at least as high, if not higher, than simply "obtain[ing] a consumer report ... knowingly without a permissible purpose" (the conduct described by § 1681n(b)). This reading is supported by the fact that the willfully noncompliant conduct proscribed by § 1681n(a) exposes a violator to punitive damages and attorneys' fees, while the simple knowing noncompliance proscribed by § 1681n(b) does not.[21]

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[21] Section 1681h(e), which specifically references Section 1681n, also militates for defining "willfully" to require proof of greater *mens rea*. That provision prohibits consumers from bringing certain actions "except as to false information furnished with *malice or willful intent to injure*

The Drafting History Of § 1681n Indicates That Congress Considered Willfulness To Mean Something More Than Recklessness. There is no reason to believe that Congress intended to authorize punitive damages and potentially crippling statutory damages for merely reckless violations of FCRA, particularly when violations of the Act's myriad technical requirements will often (as here) have caused no one any actual harm. The legislative history strongly suggests that Congress meant to reserve such severe sanctions for truly egregious misconduct.

The Senate Bill that ultimately became FCRA originally contained a gross negligence standard for actual damages and a willfulness standard for actual and punitive damages. S. 823, 91st Cong. §§ 616-17 (1969). After considering whether to lower the standard for actual damages to simple negligence, and to allow punitive damages for either willful or grossly negligent violations, Congress ultimately adopted negligence for actual damages and willfulness for punitive damages. *Compare* H.R. 19403, 91st Cong. § 52 (1970) (proposing a gross negligence standard for actual and punitive damages as an alternative to willfulness) *and* H.R. 19410, 91st Cong. § 52 (1970) (same) *with* 15 U.S.C. § 1681n (1970) (adopting "willfuly"—but not gross negligence—as the standard for actual and punitive damages). Congress thus chose expressly to limit the availability of punitive damages to willful (and not merely grossly negligent) violations.

When Congress enacted FCRA, recklessness and gross negligence were the same for all practical purposes. *See, e.g., Black's Law Dictionary* 1185 (4th ed. 1968) (defining "gross negligence" as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences");

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such consumer." The Ninth Circuit's definition of "willful" would be nonsensical there, since a person cannot *recklessly* "inten[d] to injure" a consumer. *Cf. Kawaauhau*, 523 U.S. at 61 (where § 523(a)(6) of Bankruptcy Code precludes discharge of debts incurred as a result of "willful and malicious injury by the debtor to another," "willful" means "deliberate or intentional").

Farmer v. Brennan, 511 U.S. 825, 836 n.4 (1994) ("[I]n practice [gross negligence] typically mean[s] little different from recklessness as generally understood in the civil law ...."). Thus, the drafting history of § 1681n indicates that, by limiting the availability of punitive damages to violations that are willful, Congress rejected the recklessness standard adopted by the Ninth Circuit.

2. The Ninth Circuit's Interpretation Of § 1681n(a)'s Willfulness Requirement Should Be Rejected Because It Raises Grave Constitutional Doubts

There is no reason to believe that Congress intended to invite the constitutional problems that would accompany adoption of the Ninth Circuit's tepid interpretation of FCRA's willfulness requirement. It is well established that, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (Scalia, J.). That canon counseling avoidance of statutory interpretations that raise grave constitutional doubts argues powerfully for construing FCRA's willfulness requirement to require, at a minimum, proof of a knowing violation of the Act.

Even where, as here, a plaintiff concedes that the defendant's failure to send adverse-action notices caused no one any actual harm, the statutory and punitive damages authorized by § 1681n(a) aggregated in a nation-wide class action create the potential for massive and crippling liability. *See, e.g., Trans Union LLC v. FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of writ of certiorari) (noting that the petitioner, which had "been named as a defendant in a series of class actions brought under the FCRA, allegedly on behalf of the 190 million individuals ... face[d] potential liability approaching $190

billion").[22] If it is ever permissible to impose such crushing liability without evidence of actual harm, this Court's precedents suggest the need for proof of extraordinarily reprehensible misconduct. Yet, the Ninth Circuit's interpretation of the Act's "willful[ness]" requirement demands nothing of the sort. To cabin the reach of damages awards in a meaningful way, and avoid needlessly creating substantial constitutional problems, § 1681n(a) should be interpreted to require, at a minimum, proof of a knowing violation of the Act.

In *Gore* and *State Farm*, this Court confirmed that due process prohibits damages awards that are "grossly excessive" in comparison to their purposes. *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). The Court established three "guideposts" to evaluate whether punitive damages are improper: the relationship between the actual harm suffered by the plaintiff and his punitive damages award; the degree of reprehensibility of the defendant's actions; and comparison to legislative penalties for comparable misconduct. *Gore*, 517 U.S. at 575. Section 1681n(a) presents substantial constitutional challenges because it permits a consumer to recover punitive damages in the absence of any actual harm.

This lack of any assurance of a "reasonable relationship" between punitive damages and actual harm, if not by itself fatal to the statute, necessarily places great weight on the reprehensibility inquiry, because as this Court has explained a high ratio of punitive-to-actual damages demands proof of "a particularly egregious act." *Gore*, 517 U.S. at 582. But the Ninth Circuit's tepid interpretation of "willfully" fails to provide that necessary constitutional restraint. Under the Ninth Circuit's "reckless disregard" standard, a great deal of conduct that is not inherently

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[22] This is not merely a hypothetical problem as courts have already certified classes of over a million insureds under FCRA. *See* Brief of Financial Services Roundtable et al. as *amici curiae* at 20.

"egregious" or "reprehensible" may nonetheless trigger punitive damages.

The Act's provision for statutory damages of $100-$1000 per violation without any proof of actual harm likewise argues for requiring a mindset more heinous than a mere reckless disregard. Statutory damages in the absence of actual economic harm, especially when aggregated, can quickly amount to the sort of "grossly excessive or arbitrary punishments" condemned in *State Farm*. 538 U.S. at 416. The courts of appeals have accordingly expressed concerns similar to those raised by unbounded punitive damages when addressing aggregated statutory damages.

In the class action context, the multiplication of fixed statutory damages can amount to enormous penalties without proof that the defendant's conduct caused any actual harm. Several circuits have acknowledged that such statutory damages in the absence of actual damages can implicate due process concerns, especially in the context of a class action. For example, the Second Circuit has observed that "combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis ... with the class action mechanism that aggregates many claims ... may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award." *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003); *see also London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) ("Under such circumstances [where the plaintiff suffered no economic harm], even though economic harm is not an element of the Florida common law claim for restitution, it may be required for superiority under the Federal Rules of Civil Procedure. This is especially likely when, as in the present suit, the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff."); *cf.*

Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (expressing alarm in a case involving the Truth in Lending Act's statutory damages provision that "the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act"); *Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89, 92 (N.D. Cal. 1972) (noting that aggregated statutory damages "would amount to ten times defendant's net worth and more than 230 times its total net income").

To ensure the necessary measure of proportionality in the FCRA's damages regime, the term "willfully" must refer, at a minimum, to knowing violations of the Act, and not to mere reckless disregard as interpreted by the Ninth Circuit. Certainly where actual damages are zero, only a very high degree of culpability could provide the necessary constitutional constraint. The Ninth Circuit's holding that mere recklessness will suffice fails to keep the statute's punitive and statutory damages regime within lawful bounds.[23]

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[23] A holding to this effect would not threaten the vast bulk of laws that permit statutory damages in the absence of actual injury. Most of these laws already contain some feature that adequately cabins the scope of punishment. For example, the ECOA provides damages in the absence of actual injury, but caps individual claims at $10,000, and class actions at $500,000 or 1 percent of the defendant's net worth. 15 U.S.C. § 1691e(b). Civil rights statutes may allow punitive damages without economic damages, *see* 42 U.S.C. § 1981a, but courts have described the discriminatory conduct as inherently egregious. *S. Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001, 1011 (9th Cir. 2005) (discrimination is "a special area of public concern where affront to human rights may require high punitives"), *cert. denied*, 126 S. Ct. 1342 (2006). And environmental laws may provide for statutory sanctions to preempt conduct that poses a risk of enormous harm. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7413(b) (providing for civil penalties up to $25,000 per day per violation). But ultimately, for any such statute to satisfy constitutional norms, there must be some constraining feature, whether it is from the

Lenity—also rooted in due process—further militates against the Ninth Circuit's position. As this Court has explained, "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' and ... 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Jones v. United States*, 529 U.S. 848, 858 (2000) (citations omitted). That principle should apply fully here for two reasons. First, willfulness is equally a requisite for FCRA's criminal sanctions. *See Ratzlaf*, 510 U.S. at 148 ("[W]ere we to find [the statute's] 'willfulness' requirement ambiguous ... we would resolve any doubt in favor of the defendant."). And second, the civil damages provided by the Act are punitive in nature. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992) (applying the rule of lenity in construing a punitive tax statute in a civil setting); *see also* Brief of Financial Services Roundtable et al. as *amici curiae* at 12-14. Application of lenity argues powerfully for reading willfulness to require proof of a knowing violation, because limiting the imposition of punitive and statutory damages to defendants "conscious of their wrongdoing sensibly allows [the statute] to reach only those with the level of 'culpability ... we usually require in order to impose criminal liability.'" *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (quoting *United States v. Aguilar*, 515 U.S. 593, 602 (1995) (alteration in original)).[24]

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standard of conduct required to trigger liability, or from a cap on the scope of punitive damages.

[24] The fact that under the Ninth Circuit's holding *any* violation of the Act's technical requirements—including any defect in the wording of the adverse-action notice—can serve as the predicate for a "willful" violation, Pet. App. 23a-25a, further counsels interpreting the term restrictively to avoid "the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 524 U.S. at 194.

3. This Court's Decision In *Thurston* Provides No Support For The Ninth Circuit's Holding

In concluding that FCRA's willfulness requirement can be satisfied with a showing of mere reckless disregard, the Ninth Circuit placed great reliance on this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and its progeny. That reliance was misplaced. In *Thurston*, this Court considered the liquidated damages provision of the Age Discrimination in Employment Act ("ADEA"), which provides double damages in the event of a "willful" violation of the statute. But the Court's adoption of a "reckless disregard" standard for the ADEA's willfulness element does not suggest a similar result here, for two reasons. First, although the Court deemed the ADEA's liquidated damages provision "punitive," *id.* at 125, the two-to-one liquidated/actual damages ratio provided by the ADEA assures proportionality. Second, the Court in *Thurston* relied heavily on the unique legislative history of the ADEA, which directed courts to interpret it in accordance with the Fair Labor Standards Act ("FLSA"), a statute that at the time of the ADEA's enactment had already been interpreted widely to equate "willfulness" with "reckless disregard." *Id.* at 126. As explained above, FCRA's legislative history contains no suggestion that Congress intended willfulness to mean less than a knowing violation of the law. *Thurston* thus provides no support for the Ninth Circuit's interpretation of this Act.

B. Regardless Of The Precise Connotation Of "Willfully," The Ninth Circuit Erred In Failing To Appreciate That, As A Matter Of Law, GEICO Committed No Willful Violation Of The Act

In rejecting the "actual knowledge" standard employed by the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, the Ninth Circuit purported to adopt the "reckless disregard" standard endorsed by the Third Circuit. Pet. App. 31a-32a. In reality, the standard articulated by the

Ninth Circuit departs radically from even the Third Circuit's view.

The Ninth Circuit defined "reckless disregard" inversely, stating that a company will *not* have acted with "reckless disregard" if it has (1) "diligently and in good faith" attempted to determine its obligations *and* (2) "thereby come" to a non-"creative," not "unreasonable[]," "plausible," and/or "tenable" interpretation of FCRA. Pet. App. 34a. Where, however, a company has relied on an interpretation that a court finds "unreasonable[]," [un]tenable," "implausible," or "creative," then (according to the Ninth Circuit) the company may be deemed to have acted with "reckless disregard" and subjected to massive statutory and punitive damages—even if the interpretation was derived from a legal opinion that the company sought for the very purpose of ensuring compliance with the law. *Id.* (holding that, where an interpretation is "implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive").

The Ninth Circuit's articulation is flawed in two important respects: first, it mistakenly pegs the objective component of "reckless disregard" to the reasonableness of the disputed legal interpretation; and second, it suggests that the answer to the objective inquiry may overwhelm any consideration of the defendant's actual, subjective good faith. This approach cannot be what Congress intended, as it would permit a finding of willfulness—and thus liability for punitive and statutory damages—to be based on nothing more than an incorrect interpretation of FCRA's complex provisions. At a minimum, "willfulness" under FCRA should require both a showing that the defendant recklessly disregarded consumers' rights by adhering to a legally indefensible interpretation of the Act *and* that the defendant knew that it's interpretation was almost certainly wrong (and thus, was acting in bad faith).

The Ninth Circuit's error, though, went beyond a failure to *articulate* the correct legal standard. In its first two (later-vacated opinions), the Ninth Circuit held that GEICO

willfully violated the Act purely because the court disagreed with GEICO's (and the district court's) interpretation. *See* 416 F.3d at 1115-16; 426 F.3d at 1038-40. Although the Ninth Circuit ultimately rescinded its holding that GEICO had acted willfully as a matter of law, it suggested for purposes of the remand that GEICO's interpretation of its FCRA obligations may have been so "implausible" that even evidence of its prior consultation with counsel might not suffice to disprove a willful violation of the Act. Pet. App. 34a.

There should have been no need for a remand in this case, because as a matter of law, under any plausible understanding of the willfulness requirement, GEICO's conduct here simply cannot be deemed willful. Even if this Court ultimately were to disagree with GEICO's interpretation of FCRA's adverse-action notice requirement and adopt the interpretation advanced by the Ninth Circuit, GEICO's view is certainly a reasonable one based on the text, structure and history of the Act. Particularly given the absence of any prior authoritative interpretation, and the district court's agreement with GEICO's legal position, there should be no need for further fact-finding here, because as a matter of law such an objectively reasonable interpretation on an issue of first impression cannot be deemed "willful"—regardless of whether that term means knowing or reckless. GEICO should not be subject to a remand in which it would be required to waive its attorney-client privilege and litigate the subjective good faith of its objectively reasonable view of the law.

1. **Even Reckless Disregard Would Require A Showing That The Defendant's Interpretation Of The Act Was Legally Indefensible Or Baseless**

The Ninth Circuit alternatively described the objective component of FCRA's "willful[ness]" standard as requiring a showing that the defendant's interpretation was "unreasonable[]," "implausible," "[un]tenable," or "unlikely." Pet. App. 33a-34a. The court's casual use of these similar

but distinct adjectives betrays the confused nature of the Ninth Circuit's inquiry. Contrary to the Ninth Circuit's view, different shades of meaning are often critical, and the conflicting terminology used by the Ninth Circuit to describe this crucial element of proof makes reasoned application impossible.

In particular, the Ninth Circuit's suggestion that an "unreasonable[]" interpretation may be prima facie evidence of reckless disregard—and therefore willfulness—impermissibly conflates the heightened "willful[ness]" standard that Congress established in § 1681n(a) for punitive and statutory damages with the lower "negligence" standard Congress provided for solely actual damages in § 1681o. As this Court has explained, an objectively unreasonable interpretation is not the same thing as an objectively reckless one. *See Richland Shoe*, 486 U.S. at 135 n.13 (holding under FLSA that "[i]f an employer acts unreasonably, but not recklessly, in determining its legal obligation," its action would not "be considered willful"). Because Congress did not authorize punitive sanctions for merely negligent violations of the Act, conduct premised on an interpretation of the Act that is not objectively baseless cannot ground a finding of willfulness even if reckless disregard were the applicable *mens rea*.

Indeed, the notion that every "unreasonable" legal position suggests willful noncompliance borders on the ridiculous. If that were true, every agency whose statutory interpretation has been found wanting under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),[25] has presumptively engaged in a willful distortion of the law. And the adjective "untenable" proves no greater indicator of willfulness as it is frequently hurled between majority and dissenting opinions in this Court

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[25] *See, e.g., Rapanos v. United States*, 126 S. Ct. 2208, 2225 (2006) (plurality); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713-17 (2001).

without any suggestion that the author believes his colleagues are engaged in reckless or willful behavior.[26]

Whatever the Ninth Circuit meant by its litany of adjectives, "[t]he civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an *unjustifiably high risk* of harm that is either known or so obvious that it should be known." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (emphasis added) (*citing* W. Keeton et al., *Prosser and Keeton on Torts* § 34, at 213-14 (5th ed. 1984); Restatement (Second) of Torts § 500 (1965)). For conduct to be reckless, the disregarded risk of doing harm must be "excessive." *Id.* at 837. This Court has also formulated the question as whether the defendant had no "ground for believing [its conduct was] lawful." *United States v. Murdock*, 290 U.S. 389, 394 (1933); *cf. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (holding that a sham lawsuit within the *Noerr-Pennington* doctrine must be "objectively baseless" with no "legal viability"); *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (defining a "frivolous" argument in the Rule 11 context as "legally or factually baseless from an objective perspective"). In the context of this case, a reckless interpretation of FCRA must be not merely unreasonable, but utterly without foundation.

This standard effectively precludes liability where, as here, the legal duties the defendant has been accused of violating are not clearly defined, because a person cannot recklessly or willfully disregard an uncertain or ambiguous legal obligation. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (right must be "clearly established" to show

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[26] *See, e.g., Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 2596 (2005) (Thomas, J., dissenting) (stating that the majority's interpretation of a specific case was "untenable"); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216 (2002) (stating that the approach of one dissenting Justice led to the same "untenable" conclusion reached by another dissenting Justice); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 177 (2001) (Stevens, J., dissenting) (stating that the majority's holding rested "on two equally untenable premises").

violation of § 1983); *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) ("It is settled that when the law is vague or highly debatable, a defendant, actually or imputedly, lacks the requisite intent to violate it."). This principle underlies the mirror requirements that the government must demonstrate a violation of a "right made definite by decision or other rule of law" under the civil rights acts, *see Screws v. United States*, 325 U.S. 91, 103 (1945), and that the plaintiff must demonstrate violation of a "clearly established" right to defeat qualified immunity under § 1983. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). In criminal cases, the same principle grounds the concepts of lenity and fair warning. *See United States v. Harriss*, 347 U.S. 612, 617 (1954). And it also applies to preclude punitive damages where the legal right supposedly violated is "novel or otherwise poorly recognized." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 537 (1999) (limiting punitive damages under the ADEA to cases where the employer "'knew or showed reckless disregard'" for whether its conduct was prohibited by the statute) (citation omitted).

2. The Ninth Circuit's Decision Improperly Permits A Finding of Reckless Disregard (And Thus Willfulness) Despite A Defendant's Subjective Good Faith Efforts To Comply With The Law

The Ninth Circuit held that a company can avoid a willfulness finding only if it acts "diligently and in good faith ... *and has thereby come to a tenable, albeit erroneous, interpretation*" of FCRA. Pet. App. 34a. Under that standard, a company that acted in good faith may nonetheless be found to have acted willfully just because its interpretation of FCRA is later determined by a court to be "untenable." *See id.* ("[C]onsultation with attorneys *may* provide evidence of lack of willfulness [but it] is not dispositive.") (emphasis added). At best, this turns the statute on its head by requiring the defendant to disprove its subjective recklessness by waiving the attorney-client privilege, and, at worst, it suggests that such proof may be

unavailing in any event. Either way it is error. However willfully is interpreted, evidence that the defendant made good faith efforts to comply—including reliance on counsel's advice, however "tenable"—should render the defendant's conduct *not willful* as a matter of law.

To fully appreciate this point, the Court need only look to its own precedent in *Thurston*. There, the Court held that a "knew or showed reckless disregard" standard appropriately defined willfulness under ADEA. *Thurston*, 469 U.S. at 125-26. The Court further found that one of the defendant's interpretations of ADEA was "meritless." *Id.* at 124-25. Nevertheless, the Court held that the defendant had not acted in reckless disregard of its obligations because it in good faith tried to determine its obligations. *Id.* at 129-30. Importantly, the Court's inquiry centered on the *defendant's own actions and mens rea* (or lack thereof)—not the quality of the advice the defendant received from counsel.

This Court has repeatedly held in other contexts that objectively unreasonable (and even reckless) conduct cannot be willful where good faith is present. *See, e.g., Cheek*, 498 U.S. at 202 (a good faith belief that one is not violating the tax laws negates willfulness, "whether or not the claimed belief ... is objectively reasonable"); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) (good faith furnishes complete defense to allegations of a knowing and willful factual misrepresentation); *FPC v. Metro. Edison Co.*, 304 U.S. 375, 387 (1938) (the qualification in § 307(c) of the Federal Power Act "that the refusal must be 'willful' fully protects one whose refusal is made in good faith"); *cf. Professional Real Estate Investors*, 508 U.S. at 60-61 (to constitute an actionable "sham" under *Noerr Pennington*, a challenged lawsuit must be both objectively baseless and motivated by a subjective intent to impede competition).

In *Richland Shoe*, the Secretary of Labor urged this Court to adopt a conception of reckless disregard that is virtually identical to the one adopted by the Ninth Circuit in

this case. She asserted that an employer should be found to have acted with reckless disregard, and thus to have willfully violated the FLSA, where it "failed to seek a *reliable determination* of its obligations under the FLSA or because the advice it received afforded *no sound basis* for eliminating existing uncertainties about the employer's compliance."[27] This Court disagreed, observing that the Secretary's approach "would ... permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect assumption that a pay plan complied with the FLSA in all respects." 486 U.S. at 135.

The Ninth Circuit's willfulness definition likewise focuses on whether a company sought legal advice, and, if so, whether the advice that it received was "reasonable," "plausible," non-"creative," or "tenable." Pet. App. 33a-34a. The concerns expressed by this Court in *Richland Shoe* are thus implicated equally in this case—and the stakes here are much higher. Under FLSA, the consequence of a willful violation is a one-year extension of the statute of limitations; here, a class of plaintiffs *who suffered no actual harm or damages* could be entitled to recover millions of dollars in statutory and punitive damages. There is also a far greater statutory imperative to delineate the distinction between negligence and willfulness in this case because Congress provided two separate tiers of civil liability under FCRA: actual damages for negligence and punitive sanctions for willfulness. *Compare* 15 U.S.C. § 1681o *with* 15 U.S.C. § 1681n.

Indeed, it is unclear how a company seeking to comply with the Ninth Circuit's view of the law could effectively insulate itself from FCRA's punitive sanctions. It could retain an excellent lawyer with specialized knowledge of

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[27]Brief for the Petitioner, *Whitfield v. Richland Shoe Co.*, 486 U.S. 128 (1988) (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 905, at *62 (emphasis added); *see also* Petition for a Writ of Certiorari, *Richland Shoe*, 486 U.S. 128 (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 907, at *29 (urging the same standard).

FCRA, provide full disclosure to the lawyer, rely in good faith on the lawyer's interpretation of FCRA, convince a federal judge that its interpretation of FCRA is correct, and nonetheless be held to have acted willfully if a court of appeals later determines that the lawyer's interpretation of an issue of first impression fell below some undefined level of incorrectness. Far from encouraging compliance, the Ninth Circuit's standard turns compliance into a game of judicial roulette.

3. GEICO's Eminently Reasonable Interpretation Of FCRA's Adverse Action Requirements Was Not Willful As A Matter Of Law

If an interpretation of law is reasonable, it cannot form the basis of a willful violation. *See Richland Shoe*, 486 U.S. at 135 n.13 ("If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful ...."); *United States v. Whiteside*, 285 F.3d 1345, 1351-53 (11th Cir. 2002) (recognizing that a defendant cannot have "knowingly" submitted a false claim where he relied upon a reasonable interpretation of the law); *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 104 (2d Cir. 1997) (where conduct is not negligent, a willfulness claim "fails *a fortiori*."); *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 963 n.11 (3d Cir. 1978) ("[A] finding that [defendant] had not negligently misrepresented implies *a fortiori* that the misrepresentations, if any, were not reckless.").[28] That truism underlies both FCRA's two-tier liability scheme and Congress's provision in § 1681m(c) that a defendant's adoption of reasonable compliance procedures is an absolute defense to liability. It also should have caused the Ninth Circuit to affirm the district court, regardless of whether the Ninth Circuit disagreed with GEICO's interpretation of the adverse-action notice provision, and

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[28] *Cf. Professional Real Estate Investors*, 508 U.S. at 60 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.").

regardless of the precise *mens rea* required for proof of willfulness. Because GEICO's construction of adverse action was reasonable, the Ninth Circuit should have held that GEICO's conduct was not willful as a matter of law.

Several factors confirm the reasonableness of GEICO's interpretation.

First, and most importantly, for all of the reasons explained in Part I of this Argument, even if this Court ultimately disagrees with GEICO's interpretation of FCRA's adverse-action notice requirement, GEICO's reading surely constitutes an objectively *reasonable* analysis of the text, structure and history of the statute. Even if this Court ultimately concludes that the Ninth Circuit's view is also reasonable (despite GEICO's arguments otherwise), it is certainly not the only rational way to read the statute. Indeed, this case presents numerous *other* interpretations of the provision at issue—most produced with the assistance of reputable counsel. Of the four insurance companies to seek this Court's review on the question, *all four* took different approaches in attempting to comply with the statute.[29] Nor is this proliferation of interpretations limited to private companies with a business interest in the matter. The Federal Reserve's interpretation of the similar definition of "adverse action" in ECOA would itself run afoul of the Ninth Circuit's construction. *See* 12 C.F.R. § 202.2 (providing that a creditor does not necessarily effect an "adverse action" when it offers less than the optimal terms to a consumer). Any ambiguity in the statute that may permit multiple reasonable interpretations would only highlight the Ninth

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[29] Neither Safeco nor Hartford Fire Insurance interpreted the "adverse action" definition in § 1681a(k)(1) to apply to initial applications for insurance. *See* Brief of Safeco Petitioners at 38-39; Pet. App. 15a-16a. State Farm Mutual Automobile Insurance apparently operated based on its view that "adverse action" *could* be taken based on an initial *application* for insurance, but not based on an initial insurance *quote* given prior to the filing of a formal application. *See* Brief for Appellee State Farm Mutual Automobile Insurance Co. et al. at 12, *Willes v. State Farm Fire & Cas. Co.*, 143 Fed. Appx. 64 (9th Cir. 2005) (No. 03-35848).

Circuit's error in deeming GEICO's position one of willful noncompliance.

Second, the reasonableness of a legal interpretation depends in part on whether the law was well settled. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 202 (2001) (whether an officer was reasonable and therefore entitled to qualified immunity from a § 1983 suit is assessed in light of legal rules that were "clearly established" at time of action). In this case, the interpretation of FCRA's adverse action provision was an issue of first impression—not just in the Ninth Circuit, but within federal jurisprudence. Moreover, there was no authoritative administrative guidance on the question.[30] The absence of prior authoritative judicial or administrative interpretations renders it particularly difficult to conclude that GEICO's first-impression interpretation of FCRA's adverse-action notice requirement was so unreasonable as to be willfully noncompliant. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 423-24 (1978) (affirming Fourth Circuit's holding that EEOC's action in bringing suit could not be unreasonable or meritless because the case was based on an issue of first impression).[31]

---

[30] A March 1, 2000 FTC informal staff opinion letter, cited by Edo in the Ninth Circuit, opined that an "adverse action" occurs if an applicant's rate is higher than "he or she would have been charged if the consumer report had been more favorable." Letter from Hannah A. Stires to James M. Ball (Mar. 1, 2000), *available at* http://www.ftc.gov.os/statutes/fcra/ball.htm. The letter cautioned, however, that the opinion expressed was "not binding on the Commission." *Id.*

[31] *See also Bercovitch v. Baldwin Sch., Inc.*, 191 F.3d 8, 11-12 (1st Cir. 1999) (affirming district court's denial of attorneys' fees where complaint raised issues of first impression and was therefore not frivolous or unreasonable); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (reversing district court's finding of willfulness where law regarding doctrine at issue was so unsettled that defendant's interpretation could not be unreasonable), *cert. denied*, 520 U.S. 1156 (1997); *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995) (holding that because case was one of first impression, defendant did not exhibit willfulness necessary under admiralty law to entitle plaintiff to punitive damages); *Reich v. Gateway Press, Inc.*, 13

Third, and perhaps most strikingly, *the district court agreed with GEICO's interpretation of the law.* Pet. App. 47a. As this Court has recognized, "[a] winning lawsuit is by definition a reasonable effort." *Prof'l Real Estate Investors*, 508 U.S. at 60 n.5. While the district court was reversed on appeal, the endorsement of an Article III judge is powerful evidence of reasonableness. *Cf.* Restatement (Second) of Torts § 675 cmt. B (1977) ("[A] decision by a competent tribunal in favor of a person initiating civil proceedings is conclusive evidence of probable cause. This is true although it is reversed on appeal and finally terminated in favor of the person against whom the proceedings were brought.").

Regardless of whether this Court ultimately agrees with GEICO's reading of the statute, the endorsement of the district court, absence of prior authoritative judicial or administrative guidance, plethora of diverse alternative interpretations, as well as the objective reasonableness of GEICO's reading judged on its own merits, compel the conclusion that GEICO did not willfully violate the Act. GEICO should not be required to waive its attorney-client privilege and litigate its subjective good faith in these circumstances.

CONCLUSION

For the reasons set forth, this Court should reverse the judgment of the Court of Appeals and dismiss Edo's claim against GEICO.

F.3d 685, 702-03 (3d Cir. 1994) (declining to find a willful violation in a case of first impression under FLSA).

Respectfully submitted,

Maureen E. Mahoney
Counsel of Record
Richard P. Bress
Eric S. Volkman
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Robert D. Allen
Meloney Cargil Perry
Jay F. Utley
Brandon P. Long
Baker & McKenzie LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 978-3000

Counsel for Petitioners GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company

STATUTORY ADDENDUM

15 U.S.C. § 1681a (2000). Definitions; rules of construction

* * *

(k) Adverse action.

(1) Actions included. The term "adverse action"—

(A) has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act [15 USCS § 1691(d)(6)]; and

(B) means—

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 604(a)(3)(D) [15 USCS § 1681b(a)(3)(D)]; and

(iv) an action taken or determination that is—

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 604(a)(3)(F)(ii) [15 USCS § 1681b(a)(3)(F)(ii)]; and

(II) adverse to the interests of the consumer.

* * *

15 U.S.C. § 1681m (2000). Requirements on users of consumer reports

(a) Duties of users taking adverse actions on the basis of information contained in consumer reports. If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall—

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

* * *

15 U.S.C. § 1681n (2000). Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this title [15 USCS §§ 1681 et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of–

(1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance. Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $ 1,000, whichever is greater.

* * *

15 U.S.C. § 1681o (2000). Civil liability for negligent noncompliance

(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this title [15 USCS §§ 1681 et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

* * *

15 U.S.C. § 1681q (2000). Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, United States Code, imprisoned for not more than 2 years, or both.

15 U.S.C. § 1681r (2000). Unauthorized disclosures by officers or employees

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under title 18, United States Code, imprisoned for not more than 2 years, or both.

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Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENI EDO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' JOINT BRIEF ON THE MERITS

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

SCOTT A. SHORR
Counsel of Record
N. ROBERT STOLL
ROBERT A. SHLACHTER
STEVE D. LARSON
STOLL STOLL BERNE LOKTING & SHLACHTER, P.C.
209 Southwest Oak Street
Suite 500
Portland, Oregon 97204
(503) 227-1600

Attorneys for Respondents

December 2006

QUESTIONS PRESENTED

1. Whether proof of "reckless disregard" of a defendant's obligations under the law is sufficient to establish a willful violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681n(a)(1)(A), as it is under similar federal civil statutes that incorporate a willfulness standard of liability.

2. Whether GEICO took an adverse action against respondent Ajene Edo within the meaning of FCRA, 15 U.S.C. 1681a(k), when it denied him insurance with one of its subsidiaries and issued him a more expensive policy from another affiliate based, in part, on consideration of his credit file.

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STATEMENT OF THE CASE

Following both the clear text of the Fair Credit Reporting Act ("FCRA") and over seventy years of Supreme Court precedent, the Ninth Circuit Court of Appeals held that a "willful" violation of a civil statute, 15 U.S.C. § 1681n(a), can be established by proof that a defendant violated the statute "either knowing that the action violates the rights of consumers or in reckless disregard of those rights[.]" GEICO Pet. App. 33a-34a.[1] That was the extent of the Ninth Circuit's holding on willfulness. The court did not apply its "knowing or reckless" standard to any factual record. It remanded the case for further proceedings and provided *dicta* to guide the district court's consideration of a complete factual record, particularly should defendants *choose* to raise an advice of counsel defense. GEICO Pet. App. 34a. That *dicta* is also consistent with this Court's case law defining willfulness.

No lower court has yet considered any factual record on the issue of willfulness in these cases. Petitioners originally moved for summary judgment on several grounds. Because the district court concluded that petitioners had not taken "adverse actions" under FCRA, it never reached their argument that no reasonable juror could conclude that they acted willfully. GEICO Pet. App. 44a-47a. Safeco Pet. App. 12a-14a, 22a n 5. The Ninth Circuit reversed the district court's substantive "adverse action" ruling, defined the appropriate standard for willfulness, and remanded. The petitions for certiorari presented the question whether the Ninth Circuit's

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[1] "GEICO Pet. App." refers to the appendix to the GEICO petition that contains the published Ninth Circuit opinion. The *Safeco* case was resolved by an unpublished memorandum opinion that incorporated the published Ninth Circuit Opinion in *GEICO*. Safeco Pet. App. 2a. Except where specifically noted, "GEICO" refers to all of the GEICO respondents, including the lead company Government Employees Insurance Co., which employs all GEICO employees. "Safeco" refers to the lead respondent Safeco Insurance Company of America, which employs all Safeco employees, and the affiliated Safeco companies that are also respondents.

willfulness standard was correct, but did not ask this Court to apply the standard to the facts. GEICO Pet. i; Safeco Pet. i. Nonetheless, petitioners now not only ask this Court to adopt a legal standard that contradicts the statute and the Court's case law, they also ask the Court to find that they cannot be liable *as a matter of law* based solely on their legal arguments, without review by any court of the facts concerning their state of mind when they violated the statute. This attempt to bypass all factual review, including an initial review by the district court of the summary judgment record, is particularly inappropriate because willfulness is an issue of intent properly left to a fact-finder, typically the jury.

The Ninth Circuit also concluded, again based on the clear text of FCRA and the undisputed facts, that GEICO customer Ajene Edo suffered an "adverse action" under 15 U.S.C. § 1681a(k)(1)(B)(i) when GEICO, based in part on a review of Edo's credit information, *denied* him insurance with the preferred and *lower cost* insurer GEICO General and *increased* his premiums by issuing him a more expensive policy with GEICO Indemnity. GEICO Pet. App. 20a-21a, 36a. GEICO's contention that the Ninth Circuit held that Edo was adversely treated "even when his credit score had no effect on premiums," GEICO Br. 1, misstates the Ninth Circuit's opinion and is directly contradicted by the factual record. It is undisputed that GEICO *denied* Edo insurance with one of its subsidiaries and *increased* his premiums by placing him in a more expensive affiliated company based in part on its review of *his* actual credit information. GEICO JA 80.

The Fair Credit Reporting Act. FCRA was enacted to regulate three interrelated groups: (1) consumer reporting agencies, which collect confidential consumer information, (2) suppliers of information to consumer reporting agencies, and (3) users of consumer information, such as GEICO and Safeco, that use this confidential information in business transactions with consumers. 15 U.S.C. § 1681 *et seq.*

With respect to users of consumer or credit information, FCRA is a straightforward notice statute. If users of con-

sumer information, here insurance companies, use credit information in connection with a consumer transaction, they must give notice when they take an "adverse action" against the consumer based, at least in part, on his credit information. 15 U.S.C. §§ 1681m; 1681a(k)(1). An adverse action includes "a denial or cancellation of, [or] an increase in any charge for . . . any insurance existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). Thus, if an insurance company denies a consumer insurance or increases a charge for insurance in connection with its underwriting process (*whether for a new or existing customer*) "based in whole or part on any information contained in a consumer report," the insurer must give the consumer notice. 15 U.S.C. § 1681m(a).

Petitioners correctly state that FCRA was designed to promote efficiency for business transactions and protect consumers' privacy in their confidential information and transactions. GEICO Br. 2; Safeco Br. 5, *citing TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). Congress granted businesses the privilege of access to vast amounts of otherwise personal and confidential consumer information, including social security numbers, business transaction histories, loan transactions, banking data and extensive personal histories such as employment information. It provided, however, that this privilege would come with the responsibility of informing consumers whenever that information resulted in an adverse action against them. 15 U.S.C. § 1681m. As Senator Proxmire, the original proponent, explained, "[i]n this way the individual is alerted to the existence of possible inaccuracies in his credit file and has an opportunity to take corrective action." 115 Cong. Rec. 2415 (Jan. 31, 1969).

FCRA's notice procedure was intended to promote the use of *accurate* credit information when businesses make decisions based on credit risks. *See* 15 U.S.C. § 1681(a)(1) ("Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the con-

tinued functioning of the banking system"); 15 U.S.C. § 1681(b) (a purpose of FCRA was to create a system that was "fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information"). Congress was particularly concerned that consumers not be treated adversely based on inaccurate, dated, and incomplete information. *See* S. Rep. No. 91-517 at 1 (1969) ("the purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a consumer report.").

Through the notice procedure, every consumer has a fair chance each time credit information is used against him to ensure that the business is reviewing *his* credit information and not someone else's, which often happens by mistake or through identify theft, and that the credit information used against him is accurate, current, and complete.

In crafting FCRA's liability provisions, Congress created several different levels of increasing liability with correspondingly increasing standards for proof of culpability. Plaintiffs who seek to recover only actual damages based on a violation of FCRA must prove that the defendant acted negligently. 15 U.S.C. § 1681o. Plaintiffs who seek alternative statutory damages provided by Congress of between $100 and $1,000 for each violation (as respondents do here) or punitive damages must prove that defendants "willfully fail[ed] to comply" with FCRA. 15 U.S.C. § 1681n(a)(1)(A). As discussed below, this civil willfulness standard requires more than negligence, namely at least recklessness, but falls below the standard that Congress required to prove liability under other FCRA sections, including other civil, administrative and criminal liability sections where Congress expressly required proof of a "knowing" violation. 15 U.S.C. §§ 1681n(a)(1)(B) & (b), 1681q, 1681r.

The Insurance Industry's Use of Credit in Underwriting Policies and Determining Premiums. Petitioners generally accurately describe how insurance companies use credit information when underwriting consumers' insurance poli-

cies. Insurance companies assign a version of a credit score—called an "insurance score"—to each applicant because they believe credit risk correlates with insurance risk. These scores are based on information in each consumer's credit report maintained by the various consumer reporting agencies. The insurance companies then use that credit score, in conjunction with other factors, in their underwriting to determine the insured's company placement and premium.

In GEICO's system, for example, an insured calls a 1-800 number to apply for insurance. GEICO JA 20. Typically, one lead company—here Government Employees Insurance Company and Safeco Insurance Company of America—employ the personnel who take these calls, process the information, and, in connection with the underwriting, decide the company placement and premium. GEICO JA 33, Safeco Rec., D.E. 90. The lead company's sales representative obtains information, including credit information, and a computer calculates the insured's risk based on the insurance score and other factors such as age and driving history to determine company and tier placement. GEICO JA 20. The customer is then considered for insurance in one of the affiliated companies in a descending order of preference: first in the preferred company that offers the lowest rates to those with the best credit and least associated risks; if denied insurance with the preferred company, the applicant is then considered for a higher-risk "standard" company that offers higher rates to those with slightly higher risks; and then, if the consumer has even worse credit and other related risk factors, the consumer is placed in the highest-risk company with the highest rates. GEICO JA 33; Safeco Rec., D.E. 90. The company places the consumer in the insurance company it chooses based on his credit information and other risks; the consumer likely has no knowledge of the differences in companies because he called, for instance, a 1-800 number for "GEICO" and, in fact, received "GEICO" insurance, albeit with a GEICO affiliated company with higher rates.

Contrary to the suggestion of petitioners and various insurance industry *amici*, insurance companies do not limit their best rates and placements to consumers with "perfect credit" or to "a make-believe super consumer." GEICO Br. 17. Rather, there are different ranges of credit scores that, in conjunction with other factors, the industry uses to determine those who receive the lowest premium rate. GEICO, for example, uses broad ranges of credit scores to assign consumers to one of the three companies and several tiers within those companies, and consumers with far less than perfect credit can qualify for the lowest cost policy. [2]

Moreover, each insurer itself decides the range of credit scores necessary to get the lowest rate offered and which customers are charged higher rates based on their credit scores. The range of credit scores necessary to get the lowest rate offered was not imposed by Congress or the Ninth Circuit.[3] As the United States' amicus brief notes, Congress also does not require petitioners to use consumers' credit information; petitioners have chosen to use confidential credit information in their underwriting. FCRA merely requires that users, having received the privilege of access to this confidential information, give notice when they treat consumers adversely by denying insurance or increasing the charge for insurance based in part on a review of credit information.

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[2] For instance, GEICO assigned "credit weights" corresponding to various credit scores. Credit weight is the relative weight assigned to credit when considered with other factors, such as driving history, to determine policy cost and placement. GEICO used credit scores ranging from 1 through 990. GEICO JA 67-68. The top credit weight was 105, corresponding to credit scores from 745 through 990, a broad range that does not require "perfection." *Id.* A somewhat lower credit weight might still qualify an applicant for the best rate at GEICO General if other factors, such as driving record, were very favorable. GEICO JA 67-68.

[3] GEICO decided to use credit scores "to maintain a competitive position" because "some major competitors already use credit scoring as an underwriting factor." GEICO JA 59.

Petitioners and their insurance industry *amici* complain that most people do not get the lowest rate offered—a complaint not likely to become part of any advertising slogan—but this is only because insurance companies have chosen to segment the market and risks such that they offer their lowest rate to only a part of the overall pool. There is no "perfect credit" standard, but only the relative standard that each particular insurer sets as the cut-off for obtaining that insurer's lowest available rate.

Federal Trade Commission (FTC) Guidance on FCRA Confirms the Clear Statutory Requirements That Notice Must Be Given to Insurance Applicants When They Pay Higher Premiums Based in Part on a Review of Their Credit Information. In addition to the plain text of the FCRA, the insurance companies had specific guidance from the FTC that the "adverse action" provisions were to be interpreted broadly, applied to *all* actions that could be considered to have a negative impact, and specifically applied to charging consumers higher rates in connection with initial applications. In its official commentary drafted pursuant to notice and comment rulemaking procedures, the FTC informed businesses in 1997 that "the term adverse action is defined very broadly by Section 603 of the FCRA. 'Adverse actions' include all business, credit, and employment actions affecting consumers that can be considered to have a negative impact[.]" 16 C.F.R. Pt. 601, App. C (Prescribed Notice of User Responsibilities); 62 Fed. Reg. 35586 (July 1, 1997).

More specifically, in October 1998, the FTC provided a pamphlet for insurers titled, "Consumer Reports: What Insurers Need to Know." Safeco JA 65-68. It informed insurers that amendments to the FCRA "increase the legal obligations of insurers who use consumer reports" and that the disclosure requirements apply to "new applicants as well as current policy holders." Safeco JA 65. It further stated that the decision to "charge a higher premium" to an initial applicant was an adverse action even if credit information played only a minor

role in the decision. *Id.* at 66-67 (also noting that a decision to deny insurance at "standard rates" is an adverse action).

In March 2000, before the adverse actions at issue in both cases here, the FTC staff wrote a letter in response to a question from an insurance company lawyer named James Ball. Letter from Hannah A. Stires (FTC) to James Ball (Mar. 1, 2000) ("FTC Ball Letter"). The letter, posted on the FTC website at http://www.ftc.gov/os/statutes/fcra/ball.htm, reviewed the law and reminded insurers that an "adverse action" occurs when "the applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report had been more favorable." This included not giving a discount to an initial insurance applicant based in part on his or her credit score. The FTC concluded that an initial insurance applicant whose premium is increased due to his credit information is "precisely the type of consumer that Section 615(a) [15 U.S.C. § 1681m(a)] is designed to assist." *See also Mick v. Level Propane Gasses, Inc.*, 1999 WL 33453772 at *12 (S.D. Ohio 1999) (stating that charging initial applicants higher rates for gas contracts than if they had paid cash could be adverse actions if based in part on credit scores).

Neither petitioners nor their *amici* cite guidance from any source prior to their violations of the statute that suggests, let alone states, that insurers may use credit scores to deny applicants insurance or increase initial rates without providing adverse action notices. Further, petitioners were invited by the FTC to obtain guidance, as Mr. Ball did on behalf of his insurance company client, if "the matter involves a substantial or novel question of law or fact and there is no clear Commission or court precedent." 16 C.F.R. § 1.1(1). Even assuming for the sake of argument that the statute was not clear, petitioners at a minimum recklessly chose to proceed with their conduct by ignoring the FTC Ball Letter and failing to seek clarification from the FTC, clarification that existed and confirmed that they were violating FCRA's plain terms.

Safeco's Adverse Action Against Respondents Burr and Massey. Respondents Charles Burr and Shannon Massey applied to Safeco for automobile and renters insurance, respectively (Burr in 2002 and Massey in 2001). The undisputed facts are that Safeco checked their credit information and, based in part on that information, issued them policies at higher rates than they would have received if they had better credit. *See* Safeco Pet. App. 4a-5a.[4] Safeco gave notice to neither Burr nor Massey. The record contains no contemporaneous documentation of the reasons Safeco decided not to provide them notice. However, Safeco was aware that the FTC provided guidance regarding the Fair Credit Reporting Act. In fact, Safeco directed its employees to the FTC website that included the pamphlet "Consumer Reports: What Insurers Need to Know" and noted that the website included "information on what insurers need to know about the use of consumer reports." Safeco JA 69 (referring to FTC website as a "good resource"); Safeco JA 65-68 (FTC Pamphlet); *see also* Safeco JA 44-45 (testimony that Safeco representative "ha[d] heard about FTC with some opinions").

Following its ruling in another case that charging a higher amount to a new applicant is not an adverse action, *see Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307 (D. Or. 2003), the district court granted Safeco summary judgment against Burr and Massey. Safeco Pet. App. 11a-12a. The Ninth Circuit reversed based on its contrary resolution of the adverse action issue in *GEICO* and remanded for consideration of willfulness under the "reckless disregard" standard announced in *GEICO*. Safeco Pet. App. 1a-2a. Safeco petitioned for certiorari solely on the question whether the Ninth Circuit "erred in holding that a defendant can be found liable for a 'willful'

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[4] Safeco's brief notes that the premium for an *earlier* policy it issued Burr was not based on credit information because he would not have qualified for a lower rate regardless of credit. Safeco Br. 7. That is not the policy at issue, so the point is irrelevant other than to contradict Safeco's position that Burr was an initial applicant to the Safeco companies.

violation of [FCRA] upon a finding of 'reckless disregard' for FCRA's requirements," and did not seek review either of the adverse action issue or the application of the willfulness standard to the facts. Safeco Pet. i.

GEICO Denied Edo Insurance and Increased His Rates Based, in Part, on His Credit Score. GEICO determined respondent Ajene Edo's rates and placement in connection with the underwriting of his policy using its standard process for considering credit information. After Edo called a 1-800 number, GEICO obtained his credit information and used it to generate his insurance score. GEICO JA 20-21. Based in part on consideration of his credit in the underwriting process, GEICO denied Edo insurance with the preferred company GEICO General, which offers the lowest rates, and issued Edo a more expensive policy with GEICO Indemnity. GEICO JA 34-35. It is undisputed that if Edo had better credit, he would have received a less expensive policy from GEICO General. GEICO JA 34-35, 80. As GEICO's "credit matrix" reveals, if Edo's insurance score were higher, he would have received a higher "credit weight" that would have qualified him for placement with the preferred and least expensive company GEICO General. GEICO JA 67-68.

GEICO Created a Separate Procedure Outside of Its Underwriting Process to Avoid Providing Notice to Adversely Impacted Consumers. Despite having already used Edo's confidential consumer information against him by denying him insurance with the lowest cost GEICO company in the underwriting process, GEICO used an entirely separate process to decide whether to give the "adverse action" notice. GEICO consciously decided to give notice based only on a comparison between how it actually treated customers based on their credit scores and how it *would* have treated some hypothetical consumer based on a purportedly "neutral" or average credit score. GEICO JA 34, ¶ 19.

Specifically, GEICO created a purportedly "neutral" score that it claims represents an average consumer with "average" loss experience. GEICO JA 45-46. GEICO has not

revealed whether this is an average of just its own consumers, a segment of consumers of any particular GEICO subsidiary or affiliate, or all consumers in America; nor has GEICO provided any other purported basis for this number. *Id.* Although GEICO claims to have "neutralized" credit for the purpose of FCRA, GEICO never truly eliminates credit from consideration.[5] Rather, GEICO assigns an actual "credit weight" number to the neutral score. GEICO assigned the number 56 to their "neutral" credit weight, which is approximately half their top credit weight of 105. GEICO JA 67-68.[6] Even if GEICO denied someone insurance or increased his charge based on his credit score, GEICO decided only to give notice if the consumer's placement was worse than that of the hypothetical "average" consumer. GEICO JA 34-35. Thus, even though Edo had been *denied* insurance with GEICO General and received a higher premium from GEICO Indemnity based on GEICO's assessment of *his* credit score, GEICO decided not to send him notice because

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[5] In citing various insurance statutes and agency bulletins from 23 different states (*see* GEICO Br. 5 & n. 5), GEICO posits that these states "ensure that consumers with thin credit history, or no identified credit history, are not adversely treated." Not only is GEICO's reliance on these authorities misplaced, because adverse action notice requirements are controlled by federal, and not state, law (*see* 15 U.S.C. § 1681t(b)(1)(C)), but GEICO misleadingly characterizes state laws that provide for use of "neutral" credit information in setting insurance premiums. The statutes and bulletins cited by GEICO do no more than *prohibit* use of an absence of credit history, or an inability to determine credit history, in setting insurance premiums, unless the insurance company treats those consumers as if they had neutral credit information. Edo does not contend that GEICO's procedure for assigning a neutral credit weight to "no-hits" or consumers without ascertainable credit history violated any law. Edo's insurance premium was based on a review of *his* credit information, and not the hypothetical "neutral" credit information some states permit insurance companies to use when they *cannot* locate credit information.

[6] The neutral credit weight roughly corresponded to a credit or insurance score of 600. GEICO JA 67-68. The top credit weight corresponded to an insurance score between 745-990. *Id.* Edo's score was 620. *Id.*

GEICO posits that it would have also denied him insurance with GEICO General *if* he had another person's "neutral" credit information and score. GEICO JA 34, ¶19.

GEICO Decided Not to Provide Notice to Consumers Even Though It Understood It Was Taking Adverse Actions Against Them. GEICO understandably wants this Court to decide its summary judgment motion, and be the first to decide it, without consideration of any factual record and based largely on a presumption of good faith because the facts, as they exist in the record and when more clearly developed on remand, will demonstrate GEICO knew it was taking "adverse actions" against consumers without notice or was reckless in doing so. At the very least, there is disputed evidence that would prevent summary judgment if this issue were considered by the district court.

Deposition testimony confirmed that GEICO "always" considered placing someone in a higher-premium company or tier an "adverse action." GEICO JA 49. Internal GEICO documents only recently produced also show that before GEICO designed its separate system for notice, GEICO's credit score team directly considered the question of adverse action, and, two years before Edo applied for insurance, stated that "adverse action" would include the treatment Edo suffered—i.e., placing an initial applicant in a company or tier lower than GEICO's most preferred tier, if the decision is based in part on credit.[7] The credit team expressed concern,

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[7] This document was not part of the summary judgment record because GEICO delayed production until September 21, 2006, even though, as GEICO acknowledged in producing it, it was directly responsive to plaintiff's first request for production served in June 2002—long before GEICO's summary judgment motion filed in 2003. We have sought leave to lodge the document with the Clerk's Office. We refer to the document not because we believe this Court should itself consider it as evidence of GEICO's willfulness, but because it illustrates the type of evidence that will be available if, as the Ninth Circuit ordered, these cases are remanded for consideration of the factual record, and it emphasizes the

(*Footnote continued*)

however, that providing notice to all applicants who received such treatment would raise cost issues and lead to inquiries and complaints from consumers. *See also* GEICO 9th Cir. Excerpts of Record 226 (discussing concerns about curbing postal expense).[8]

There is also evidence GEICO misled state regulators that it was giving *all* consumers proper FCRA notice. In 1999, before Edo's adverse treatment in this case, the Oregon Insurance Division asked GEICO if "all applicants or requesters for a quotation get written disclosure if an adverse action, including rejection, refusal to quote, or higher rate, is made based on a credit report." GEICO JA 58. GEICO falsely and misleadingly answered "Yes" without further explanation, even though it did not give all applicants notice if they received a higher rate based on their credit report. *Id.* GEICO was also specifically asked if there were any differences between how it treated someone with no discoverable credit-information (called a "no hit") and "the treatment offered to your best credit scores." GEICO succinctly replied "[t]here are none," GEICO JA 58, although the undisputed evidence from GEICO's documents is that persons assigned neutral scores were treated worse than those with the best scores.[9]

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inappropriateness of any suggestion that this Court should apply the willfulness standard, in the first instance, to an incomplete factual record.

[8] In fact, GEICO initially provided notice to all consumers who were not placed in the lowest cost company and tier (GEICO JA 19), but abandoned that practice by the time of the adverse action against Edo.

[9] GEICO assigned its "neutral" credit score and weight to "no hit" applicants. GEICO JA 60. As noted above, the neutral credit weight was approximately half the top credit weight. GEICO JA 68. GEICO also consistently instructed its counselors to enter all possible personal identifying information for an applicant, such as current address and social security number, because "[o]bviously if an applicant has a really good insurance score, and we failed to enter enough information to make a match, the score returned will not be as high as his/her real score and could possibly affect placement." GEICO JA 75 (emphasis added). Thus, GEICO acknowledged that the neutral scores assigned to "no hit" consumers "obviously" could negatively impact placement.

Despite the clear text and purpose of the FCRA, its own understanding of an "adverse action," and the specific regulatory guidance referenced above, GEICO continued to abuse the privilege of being able to review consumers' confidential information and then used that information against consumers, but did not change its practice for giving "adverse action" notice until December 2002, months after this lawsuit was filed. In December 2002, GEICO began giving notice to applicants denied insurance or whose rates were increased because they did not have the credit score necessary to qualify for the lowest cost company or rate. GEICO JA 48-49.

SUMMARY OF ARGUMENT

The Ninth Circuit Properly Defined Willfulness to Include Knowing or Reckless Disregard for the Law. The Ninth Circuit properly defined a willful violation based on the clear text and context of FCRA to include a policy or action carried out "either knowing that policy or action to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy or action contravened those rights." GEICO Cert. App. 31a, *quoting Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997) (brackets omitted). Contrary to petitioners' arguments, the Ninth Circuit never equated willfulness with mere negligence and expressly rejected negligence as the standard.

The Ninth Circuit's definition is dictated by the clear text and context of FCRA. In each instance where Congress intended to require proof of a "knowing" violation, it did so expressly. The definition is also consistent with FCRA's structure. Recovery of actual damages requires proof of only a negligent violation. 15 U.S.C. § 1681o. Recovery of minimum statutory damages or punitive damages requires proof of a willful (that is, reckless) violation. 15 U.S.C. § 1681n(a)(1)(A). Recovery of higher statutory damages for aggravated misconduct or imposition of criminal liability requires proof of a willful and *knowing* violation. 15 U.S.C. §§ 1681n(a)(1)(B), n(b); 15 U.S.C. §§ 1681q, r, s(a)(2)(A).

The Ninth Circuit's definition also closely follows this Court's precedents dating back to at least the 1930's. Since that time, this Court has consistently concluded that "willful" violations of similar civil statutes include conduct done in reckless disregard of the rights of others. This would be a particularly unusual case in which to require a higher standard given that when Congress wanted to specifty a higher *mens rea* in FCRA, it expressly required proof of a willful and knowing violation. *See e.g.*, 15 U.S.C. §§ 1681q, r.

Petitioners' proposed objective test for proving a willful violation—as well as parts of the United States' proposed test—also contradicts this Court's precedents and well-established tort law. To prove a willful violation, a plaintiff must show either knowing or reckless disregard for the rights of others. In this fact-specific inquiry, the trier of fact must consider both subjective and objective factors. Subjective factors include whether the defendant actually understood or was conscious of an unjustifiably high risk that its conduct violated FCRA. Even within this subjective inquiry, a trier of fact may infer from the obviousness of the risk that the defendant was aware of it but recklessly proceeded anyway. Because direct evidence of intent/knowledge (e.g., a memo or testimony admitting intent to violate the law) is rare, the trier of fact may also consider objective factors as part of the totality of circumstances to determine recklessness. Thus, a jury may ask if a reasonable person in defendant's position should have been aware of an objectively high risk that its conduct violated the law. Objective factors, although important in the overall mix, are not a shield or complete defense to prevent inquiry into subjective intent, as petitioners and the United States suggest, but an alternative method of proof where clear evidence of subjective intent is absent.

This Court should conclude, as it has in the past, that a civil willful violation may include either a knowing or reckless violation. The Court should then remand this case for consideration of the full factual record by the district court. If this Court is to go beyond the questions presented and be-

come the first court to apply the standard to any facts, there is sufficient evidence to raise fact issues that petitioners, subjectively, knowingly violated FCRA or ignored an unjustifiably high risk that they had taken adverse actions against respondents and failed to give notice. Even if one considers only the objective factors, petitioners' actions represented a sufficiently reckless departure from the clear requirements of FCRA and associated guidance from the FTC to create a fact issue as to whether petitioners recklessly ignored a high risk that their conduct violated FCRA.

The Ninth Circuit Properly Concluded That GEICO Took an "Adverse Action" Against Edo. The Ninth Circuit correctly held that GEICO took an "adverse action" against Edo when, based on review of his credit information, it denied him insurance with GEICO General and increased the charges for his insurance by issuing him a more expensive policy with GEICO Indemnity. GEICO's argument that Edo's credit information had no impact on his placement or decreased his charge for insurance misstates the factual record. It is undisputed that GEICO, in connection with underwriting Edo's insurance, both denied him insurance with GEICO General and increased his premiums based, in part, on a review of *his* credit information (and not some other average person's purportedly neutral credit score). That is the definition of an adverse action under FCRA. 15 U.S.C. § 1681a(k)(1)(B)(i). Nothing in FCRA permits GEICO, after already adversely treating Edo in the underwriting process, to avoid its notice obligation by positing that it would have also denied Edo insurance if he were a hypothetical consumer with a purportedly "neutral" or "average" credit score.

GEICO's argument not only contradicts FCRA's plain text, but also eviscerates a primary purpose of FCRA, which is to ensure the accuracy of the credit information that is used against consumers. Under GEICO's notice system, GEICO always presumes that it is using accurate credit information when it compares consumers to a purportedly neutral or average score and only provides notice if those consumers are

treated worse than average. If a consumer actually has very good credit or even the best credit, but the information in his credit file is not accurate, as commonly occurs, GEICO will not give notice as long as that consumer is treated no worse than the hypothetical average consumer. The consumer may, in fact, qualify for the best rate based on his accurate credit information. GEICO, however, will never provide him notice, thus denying him the timely opportunity to check his consumer report for identify theft or other inaccuracies that may have resulted in negative treatment. The plain text and purpose of the statute foreclose the possibility that Congress intended to allow GEICO to avoid giving thousands of consumers proper notice based on a faulty presumption that GEICO must be reviewing accurate credit information and need not give consumers any opportunity to check.

ARGUMENT

I. A Willful Violation Includes a Knowing or Reckless Disregard For The Law.

A. The Text of 15 U.S.C. § 1681n(a) Demonstrates That a "Willful" Violation Includes a Reckless Violation.

In 15 U.S.C. § 1681n(a), Congress provided civil liability for willful non-compliance of FCRA. Under section 1681n(a)(1)(A), Congress provided that a consumer could recover, among other things, statutory damages of between $100 and $1,000 and punitive damages for any willful violation of the statute. The term "willfully" has appeared in section 1681n since FCRA's enactment in 1970. At that time, despite petitioners' claims to the contrary, it was well established that a willful violation included a reckless disregard for the rights of others. *See United States v. Murdock*, 290 U.S. 389, 396 (1933) (stating that a willful violation may include "conduct marked by careless disregard whether or not one has the right so to act"), *overruled on other grounds, Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 57 (1964); *see also United States v. Illinois Cent.*

R.R., 303 U.S. 239, 242-43 (1938) (citing *Murdock*'s careless disregard standard and holding that civil defendant's conduct was "willful" if it showed either intentional disregard for statute or an "indifference to its requirements.")

To support their narrower concept of the term willful, petitioners point this Court to the legal definition of "gross negligence" and give an incomplete definition of "willful" from Black's Law Dictionary. They fail to note that the complete legal definition of "willful" in the 1968 dictionary included:

> recklessness, [a] disregard of consequences, an indifference whether a wrong or injury is done or not, and an indifference to natural and probable consequences.
>
> . . .
>
> The word "reckless" as applied to negligence is the legal equivalent of "willful" or "wanton."

Black's Law Dictionary at 1773 (4th Ed. 1968) (citations omitted). "Willful misconduct" of an employee was similarly defined to mean:

> more than mere negligence, and contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries or with reckless disregard of the probable consequences.

Id. at 1774. When Congress amended section 1681n(a)(1)(A) in 1996 specifically to provide for statutory damages of between $100 and $1,000 and retained the use of the willfulness standard (Pub. L. No. 104-208, 110 Stat. 3009 (1996)), the definition of a civil willful violation continued to include recklessness. *Black's Law Dictionary* 1599-1600 (6th Ed. 1990) (*citing Murdock*, 290 U.S. at 394-95 and describing willful conduct as including "careless disregard whether or not one has the right to so act.") Thus, the common legal definition of willful at the time of enactment and amendment of section 1681n included recklessness.

B. Congress's Use of the Word "Willfully" in Context Confirms That a "Willful" Civil Violation is Less Than a Knowing Violation.

Petitioners contend that willfulness in FCRA is limited to "knowing" violations. However, even apart from the common legal definition, the text of section 1681n(a) in context makes clear Congress did not intend a civil willful violation to require proof of a knowing violation. *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596 (2004) (stating "the cardinal rule that statutory language must be read in context [because] a phrase gathers meaning from the words around it.") (internal quotation marks deleted).

Where Congress intended to require proof of a knowing violation in FCRA, it specifically used the word "knowing" or "knowingly." In the immediately subsequent subsections 1681n(a)(1)(B) and 1681n(b), Congress provided that in cases where a person obtains a consumer report not only "willfully" but also "under false pretenses or knowingly without a permissible purpose," the consumer could recover either actual damages or a minimum of $1,000, whichever is greater. Had Congress intended the word "willful" in the beginning of section 1681n(a) to require a knowing violation, the additional requirement in the following subsections that the defendant "know" that it did not have a permissible purpose under FCRA would be rendered insignificant if not superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (stating that this Court avoids interpretations of statutes that leave terms insignificant or superfluous). Similarly, subsequent subsections of FCRA imposing criminal penalties for conduct done not only "willfully" but also "knowingly" would be redundant if willfulness under FCRA already required knowledge of a violation. *See* 15 U.S.C. § 1681q (criminal liability section that provides liability for any person who "knowingly and willfully obtains" false information); 15 U.S.C. § 1681r (criminal liability section requiring proof of conduct done "knowingly and willfully"); *see also* 15 U.S.C. § 1681s(a)(2)(A) (providing the FTC the right to enforce

civil penalties upon proof of a "knowing violation" and recovery of up to $2,500 per violation).

Safeco concedes that Congress's use of the word "knowing" in sections 1681n(a)(1)(B) and 1681n(b) must refer to a knowing violation of the law—knowledge that defendant has an impermissible purpose under FCRA—and not merely knowledge of the underlying facts or of the factual consequences of the conduct. *See* Safeco Br. at 19 (conceding that "although the term 'knowingly' sometimes implies mere factual knowledge," *citing Bryan v. United States*, 524 U.S. 184, 191 (1998), "the straightforward grammatical reading of § 1681n(a)(1)(B) is that the adverb 'knowingly' modifies 'without a permissible purpose' such that knowledge of the unlawfulness of the purpose is required.") In this context, it is not possible, as it was in *Bryan* (a criminal case), that Congress used the terms "knowing" and "willful" in the same section to distinguish between knowledge of the facts and willful "knowledge of a violation of the law." Thus, the only plausible understanding of the term "willfully" in connection with its *earlier* use in section 1681n(a) is to provide a lesser standard of culpability than a knowing violation of the law.

If "willfully" already meant "knowingly" in the opening sentence of section 1681n(a), consistency would have demanded that Congress use the term "willfully" within the statute such that the immediately subsequent references in section 1681n(a)(1)(B) and 1681n(b) would have provided liability for any person who obtained a consumer report "under false pretenses or *willfully* without a permissible purpose." Indeed, since section 1681n(a)(1)(B) is already subject to the willfulness requirement of section 1681n(a), no further reference to either knowledge or willfulness would be necessary in that subparagraph under petitioners' view of willfulness. By requiring additional proof of knowledge in subsections 1681n(a)(1)(B) and 1681n(b), Congress clearly indicated that the earlier "willful" standard necessary to prove a

violation of section 1681n(a)(1)(A) meant something less than a knowing violation.[10] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *see also United Dominion Indus. Inc. v. United States*, 532 U.S. 822, 836 (2001) (same).

Petitioners' contrary arguments violate the principle that Congress "says in a statute what it means and means in a statute what it says there[.]" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). Petitioners argue that Congress's initial use of the term "willful" alone in connection with subsection 1681n(a) and 1681n(a)(1)(A) must require proof of a knowing violation because Congress subsequently required a "knowing" standard in the later subsections 1681n(a)(1)(B) and 1681n(b). *See* Safeco Br. at 20; GEICO Br. at 32 (stating that the initial use of the term "willful" must "subsume" and "encapsulate" the latter use of the term "knowing.")[11] This interpretation stands the statute on its head so that the *later* specific references requiring proof of knowledge modify the *earlier* use of the term willful. Peti-

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[10] As the United States notes, Congress also indicated the difference between "willful" and "knowing" misconduct in the titles of these subsections. U.S. Br. 14. Section 1681n's title is "**Civil liability for willful noncompliance**" and § 1681n(b)'s title specifically refers to "**Civil liability for knowing noncompliance**." Because the distinction is evident in the text of the statute, however, this Court need not refer to the titles. *See Carter v. United States*, 530 U.S. 255, 267 (2000) (stating that this Court will only consult titles of statutes to shed light on ambiguous text).

[11] GEICO claims the initial reference to willfulness in section 1681n(a) refers to conduct done with an "evil heart," or "bad intent" involving "actual knowledge of illegality." GEICO Br. at 31-32. This argument also fails to explain Congress's distinct use of the terms "willfully" and "knowingly." Moreover, this Court has held that a plaintiff, even to recover punitive damages, need not prove that defendant had an evil motive in his heart; conduct that is in reckless disregard of the rights of others suffices. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 538 (1999).

tioners cannot redraft the text to reach this result. *Dodd v. United States*, 545 U.S. 353, 359 (2005). The only logical interpretation is that the initial general reference to willful violations requires proof of less than knowing violations, such as recklessness, and where Congress wanted a higher standard of proof, it explicitly demanded proof of knowing violations in later subsections. *Russello*, 464 U.S. at 23.

C. Congress Created a Statutory Structure in Which Higher Levels of Liability Correspond to a Higher Standard of Culpability.

The structure of FCRA also demonstrates that Congress intended to have increasing levels of liability that correspond to gradually increasing requirements for proof of culpability. *See FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 132-33 (2000) (stating that a court must interpret a statute as a "symmetrical and coherent regulatory scheme" and, where possible, fit "all parts into a harmonious whole"). Thus, if a plaintiff seeks recovery of actual damages only, he need only prove negligence. 15 U.S.C. § 1681o. If a plaintiff intends to seek statutory damages and the possibility of a punitive award, he must prove the defendant acted "willfully" but not necessarily with knowledge of the violation of the law; that is, recklessness is sufficient. 15 U.S.C. § 1681n(a)(1)(A). To obtain the higher per-violation damages provided by subsections 1681n(a)(1)(B) and n(b), or 1681s(a)(2)(A), the plaintiff (or the FTC) must prove a knowing violation, and if criminal liability is pursued, the government must prove a "knowing and willful" violation. 15 U.S.C. §§ 1681q, r.

Petitioners nonetheless argue that this Court should interpret the term "willfully" in the civil liability section 1681n(a) to have the same meaning as the terms "knowingly and willfully" in the criminal provisions of sections 1681q, r. GEICO Br. 31; Safeco Br. 23. Petitioners' argument that the term "willfully" requires the same standard of "knowing violation of the law" for recovery of both the lesser civil statutory penalty under section 1681n(a) and the more extreme criminal penalty under sections 1681q and 1681r is inconsistent with

the logical structure of gradually increasing liability and standards of culpability as well as with Congress' considered use of the term "knowingly and willfully" in the criminal sections, but not section 1681n(a).[12] As the United States' amicus brief states, these terms, when used together, clearly indicate a higher level of culpability than the merely "willful" misconduct required for certain civil violations in Section 1681n(a)(1)(A). U.S. Br. 14-15.

Even within the statutory remedies available solely to consumers, Congress followed a clear structure of increasing liability upon proof of higher culpability. While section 1681n(a)(1)(A) provides for either actual damages or $100-$1,000 in statutory damages, and the chance of punitive damages, upon proof of willful, but not necessarily knowing violations, sections 1681n(a)(1)(B) and 1681n(b) both provide for actual damages *or $1,000, whichever is greater*, upon additional proof of knowing non-compliance. Thus, even though punitive damages are theoretically available under section 1681n(a)(1)(A), there is nonetheless a *minimum*

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[12] Safeco argues that Congress could not have intended a lower intent threshold for failing to provide notice, something that was purportedly less central to Congress's concerns, and a higher intent standard for proving improper use of credit information, which was purportedly more central to Congress's concerns. Safeco's arguments and its attribution of relative values to Congress's intent are contradicted by the text of FCRA. Whenever Congress intended to provide additional sanctions for those who improperly use consumer credit information, it specifically required proof of knowing misconduct. *See e.g.*, 15 U.S.C. §§ 1681n(a)(1)(B), 1681n(b), 1681q, 1681r. Where other violations were at issue, including but not limited to the failure to provide simple notice of an adverse action, Congress did not require proof of knowing misconduct (but imposed lower damages). 15 U.S.C. § 1681n(a)(1)(A). Further, Safeco's judgment that notice issues were "peripheral" to Congressional concern are contradicted by Congress's statement of purpose, which stated that the central purpose of FCRA was to ensure "accuracy and fairness of credit reporting." 15 U.S.C. § 1681(a). At the time of enactment when consumers had no right to receive an annual free credit report, the notice provisions were the method for ensuring that the credit information used was accurate.

required $1,000 statutory award for violations involving greater "knowing" culpability under section 1681n(a)(1)(B) (and the chance for punitive damages as well). That is ten times the minimum statutory damages provided under section 1681n(a)(1)(A) for other civil violations of FCRA that require a lower *mens rea* standard.

Safeco argues that this logical remedial structure is somehow destroyed by the statutory penalties available to the FTC under 15 U.S.C. § 1681s(a)(2)(A). Under that section, the FTC may recover what Safeco describes as a "modest civil penalty" of up to $2,500 per violation if it proves a pattern or practice of "knowing" violations of FCRA. Safeco Br. 22. (Ironically, while Safeco describes a potential $2,500 per violation award as "modest," it describes the lower private statutory damages of $100-$1,000 per violation as creating "astronomical" exposure. Safeco Br. 34.) The $2,500 per violation statutory award is up to two-and-a-half times, and potentially twenty-five times, the $100-$1,000 statutory award available to consumers on proof of a lesser willful violation. Even with the remote possibility of a discretionary award of punitive damages, the significant multiplier available to the FTC on proof of knowing violations naturally fits into a statutory scheme where consumers may get lesser statutory remedies than the FTC on proof of lesser culpability.

Safeco also points out that before 1996, courts had held that a plaintiff could seek civil liability against a defendant for improperly obtaining a consumer report, but that civil liability derived from proof that defendant violated 15 U.S.C. § 1681q, the criminal provision dealing with impermissible use of credit reports, because there was no specifically applicable civil liability section. Safeco argues that in adding 15 U.S.C. § 1681n(a)(1)(B), which expressly provided civil liability for knowing impermissible uses of credit reports, Congress "implicitly" adopted the reasoning of pre-1996 decisions under which civil liability could be premised on a violation of 15 U.S.C. § 1681q as long as the liability was sought through the culpability standards of 15 U.S.C. §

1681n (requiring proof of willfulness) and not the lower culpability standards of 15 U.S.C. § 1681o (requiring proof of negligence). Safeco Br. 23-24, n 6, *citing* cases. Safeco's "implicit adoption" argument ignores the explicit text of the amendment to FCRA. Expressly adopting the same standard used in the criminal provision, Congress specifically required proof of a "knowing" impermissible use of a credit report to recover actual damages or $1,000, whichever is greater, in civil liability cases. 15 U.S.C. §§ 1681n(a)(1)(B) & n(b). If anything, its decision to do so solely in connection with impermissible uses of credit reports under those sections, but not to require any higher standard of proof for other civil violations of section 1681n(a)(1)(A) demonstrates that it intended to require proof of a knowing violation only for civil sections 1681n(a)(1)(B) and n(b).

D. The Ninth Circuit's Interpretation Is Consistent With This Court's Precedents.

The Ninth Circuit's "knowing or reckless disregard" standard is also consistent with this Court's precedents defining willfulness in the same manner in other similar *civil* statutes. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (holding "willful" requires only proof of a "reckless disregard for the matter of whether its conduct was prohibited by the ADEA"); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985) (same); *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (finding same knowing or reckless standard for willful violation under Fair Labor Standards Act); *Illinois Cent. R.R.* 303 U.S. at 242-43 (holding that civil defendant's failure to unload cattle car was "willful" because it showed disregard for statute and indifference to requirements). In *McLaughlin*, this court, relying on the plain language of the FLSA, stated:

> The word "willful" is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The stan-

> dard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the Act.

McLaughlin, 486 U.S. at 133.

Petitioners, particularly Safeco, argue that there are competing lines of precedent in which this Court has, on occasion, interpreted the term "willful" to include recklessness and, on other occasions, required proof that defendant knew its conduct was unlawful. Safeco Br. 17-18. Although respondents agree that the term willful has been interpreted in context, there are no truly competing lines of Supreme Court authority interpreting *civil* statutory willfulness provisions. The civil cases cited above consistently hold that recklessness is sufficient. Petitioners cite cases requiring proof of knowledge in criminal statutes where this Court has occasionally required a higher knowing standard, but this Court has also adopted a recklessness standard depending on the text and context of the criminal statutes involved.[13]

This Court's decision in *Thurston* is particularly instructive. In *Thurston*, this Court observed that the Age Discrimi-

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[13] *See United States v. Bishop*, 412 U.S. 346, 360 (1973) (requiring proof of violation of a known legal duty in criminal tax case); *Bryan*, 524 U.S. at 191 (holding that a conviction for willfully violating a statutory prohibition on unlicensed firearm sales requires proof that defendant knew its conduct was unlawful); *Ratzlaf v. United States*, 510 U.S. 135, 136-137 (1994) (holding that a willful violation of the anti-structuring provisions requiring reporting of transactions above $10,000 requires proof of knowledge of the unlawful conduct); *Cheek v. United States*, 498 U.S. 192, 201-02 (1991) (holding that a willful violation of criminal tax laws requires proof of knowledge of illegal conduct). *But see Murdock*, 290 U.S. at 396 (holding in a criminal case that willful conduct may include "conduct marked by careless disregard whether or not one has the right so to act"); *Thurston*, 469 U.S. at 126 (noting that criminal provisions of the FLSA are consistent with willful/reckless disregard standard); *Screws v. United States*, 325 U.S. 91, 104-05 (1945) (holding reckless disregard sufficient for criminal violation).

nation in Employment Act ("ADEA") had a "two-tiered" liability structure in which plaintiff could recover actual damages for non-willful violations and statutory liquidated double damages for willful violations. 469 U.S. at 125, 128. This Court concluded that interpreting "willful" to require a higher standard of either knowledge or recklessness was consistent with that two-tiered liability scheme.[14] *Id.* at 126-28.

As noted, FCRA provides more than just two tiers of liability, but several, including gradually increasing liability for (1) actual damages, (2) layers of increasing civil and administrative statutory penalties, and (3) criminal penalties for "willful and knowing violations." A "knowing or reckless" disregard standard fits even more comfortably into a three or more tiered structure in which the top tier of criminal liability is expressly dependent on knowing violations. As the amicus brief of the United States notes, petitioners' definition of willful "leaves little, if any, room between Congress's differently articulated criminal and civil provisions." U.S. Br. 15.

GEICO attempts to distinguish *Thurston* by arguing that while the ADEA double damages provision was purportedly considered "punitive,"[15] the ADEA's two-to-one statutory ratio damages "assures proportionality." GEICO Br. at 39. This argument is a non-sequitur. The proportionality of any damages ultimately awarded does not provide a basis for distinguishing the proper interpretation of willfulness under the ADEA and FCRA. Even if the statutory remedies in FCRA

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[14] In enacting the ADEA, Congress provided liquidated civil statutory damages as a compromise in place of criminal liability. *Thurston*, 469 U.S. at 124 (discussing Senator Javits amendment to replace criminal liability with liquidated damages). Despite this Court's recognition that liquidated damages were a substitute for criminal liability, it concluded that they could be obtained based only on reckless disregard for the law.

[15] GEICO argues that this Court concluded that such liquidated damages were punitive. However, the Court merely cited the legislative history that indicated that. Here, as discussed above, Congress provided for statutory damages (as an alternative to actual damages) apart from any punitive damage award.

could be considered punitive—and Congress did not so consider them, as it provided statutory damages as an alternative to actual damages and in addition to possible punitive damages—the Ninth Circuit's reckless disregard standard under FCRA is the same standard this Court has found constitutionally sufficient for awarding punitive damages. *See e.g. Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535-38 (1999) (permitting punitive damages in a Title VII case on proof of "reckless indifference to the federally protected rights of an aggrieved individual"). [16] There is no distinction between *Thurston* and these cases.

GEICO also attempts to distinguish *Thurston* by arguing that the "unique" legislative history of the ADEA directed courts to interpret that statute consistently with the Fair Labor Standards Act (FLSA), whose provisions had already been interpreted to equate willfulness with reckless disregard. GEICO Br. 39. *Thurston*, however, did not rely only on legislative history, but relied on the plain text and context of the statute and this Court's interpretation of similar statutes. 469 U.S. at 128. Further, as noted above, there has been a "willful" provision in section 1681n since FCRA was enacted in 1970. The ADEA was enacted in 1967 and the extended FLSA limitation period for "willful" violations, at issue in *McLaughlin*, was added in 1966. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967); *McLaughlin*, 486 U.S. at 132 (discussing history of FLSA limitations period). There is no reason to distinguish Congress's understanding of the term "willfully" when enacting FCRA in 1970 from its understanding when it enacted similar provisions in the civil liability provisions in the ADEA and FLSA just a few years earlier. *See Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428

[16] *See also Smith v. Wade*, 461 U.S. 30, 56 (1983) (permitting punitive damages in Section 1983 action based on reckless disregard standard); *Gertz v. Welch, Inc.*, 418 U.S. 323, 349 (1974) (requiring proof of reckless disregard for truth to recover punitive damages in libel case).

(1973) (stating that similar statutes with similar language should be interpreted consistently).

E. The Mere Possibility of Aggregated Class Damages Based on Proof of Reckless Disregard Should Not Influence This Court's Interpretation of the Substantive Text.

GEICO contends that interpreting FCRA's willfulness requirement to be any lower than a knowing standard somehow invites "grave constitutional doubts" because of the supposed potential for crippling liability based on the aggregation of statutory damages through class certification. GEICO Br. at 34-37. GEICO's attack, however, is not directed at the meaning of "willfully" in FCRA, but at an issue not presented on this record: the possibility of both a later certification of a class and an aggregate award of class damages. Congress's intent in using the term "willfully" cannot depend on whether this is an individual case, as it stands now, or whether it ultimately may result in class certification and an aggregate class award following a finding of willfulness.

This Court has rejected the argument that the possibility of "gigantic consumer class actions" under other consumer-protective laws should influence the interpretation of substantive provisions of the statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45 (1979). In *Reiter*, this Court interpreted § 4 of the Clayton Act to provide remedies for an injury to a retail consumer's "property." The defendants argued that such an interpretation, combined with the possibility of "gigantic consumer class actions" seeking treble damages for millions of transactions "will have potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event." *Id.* The Court dismissed the argument as involving "policy considerations that are more properly addressed to Congress than to this Court. However accurate [defendants'] arguments may prove to be—and they are not without substance—they cannot govern our reading of the plain language in [the statute]." *Id.* at 345.

Congress was well within its powers when it provided the alternative of statutory damages of $100-1,000 as (1) a liquidated damages remedy for the violation of the statute itself (here, the failure to give notice), (2) a substitute for difficult-to-establish actual damages that result from a failure to receive notice of an "adverse action" and other FCRA violations, and (3) an incentive to encourage compliance with federal law.[17] *See St. Louis, I.M. & S. RY. Co. v. Williams*, 251 U.S. 63, 66 (1919) (holding that statutory penalties of $50 to $300 for excessive charges by railroads did not violate due process and that legislatures have authority to provide additional statutory penalties for such "public wrongs"); *Overnight Motor Transp Co. v. Missel*, 316 U.S. 572, 583-84 (1942) (holding FLSA liquidated damages were "compensation" and renumeration for difficult to prove damages); *Kenro, Inc v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1166 (S.D. Ind. 1997) (holding that a $500 statutory damage award under the Telephone Consumer Protection Act was permissible because Congress may "design a remedy that will 'serve to liquidate uncertain actual damages and to encourage victims to bring suit to redress violations.'") (citations omitted).[18]

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[17] Petitioners claim that Congress could not have understood the potential exposure businesses could incur as a result of statutory penalties of $100-$1,000 is contradicted by the legislative history and common sense. When the statutory damages provision was added in 1996, Congress understood that problems with the accuracy of credit information "have been the No. 1 item of complaint at the Federal Trade Commission and States attorneys general have experienced similar levels of complaint." 142 Cong. Rec. S11869 (Sep. 30, 1996). Congress also understood that credit bureaus kept information on "more than 190 million Americans" and that such information was rife with errors. *Id.* In light of the widespread inaccuracies and Congress's understanding of the breadth of the use of consumer information, Congress must have understood the potential scope of liability it created.

[18] *See also Native American Arts, Inc. v. Bundy-Howard, Inc.*, 168 F.Supp.2d 905, 914-15 (N.D.Ill. 2001) (allowing Congress to adjust statutory damages commensurate to public wrong as opposed to private injury "meshes with the ... difficulty in quantifying the amount of actual dam-

(*Footnote continued*)

The liquidated damages in FCRA substitute for actual damages that may be very difficult to prove where the consumer never gets timely notice allowing him to review the same information considered by the insurer when it took the adverse action. Once he belatedly learns of the violation, the consumer may not be able even to locate the same information considered at the time of the adverse action (because credit information is constantly revised), much less determine how any inaccuracy may have impacted the amount charged.

Congress also controls the decision to limit the availability of class actions under any particular federal statute. As Judge Easterbrook has noted, Congress chose to limit class actions under the Truth in Lending Act (TILA) and other federal statutes, but did not do so under FCRA:

> The reason that damages can be substantial [under 15 U.S.C. § 1681n], however, does not lie in an "abuse" of Rule 23; it lies in the legislative decision to authorize awards as high as $1,000 per person, 15 U.S.C. § 1681n(a)(1)(A), combined with GMACM's decision to obtain the credit scores of more than a million persons.
>
> Many laws that authorize statutory damages also limit the aggregate award to any class. For example, the Fair Debt Collection Practices Act says that total recovery may not exceed "the lesser of $500,000 or 1 per centum of the net worth of the debt collector". 15 U.S.C. § 1692k(a)(2)(B)(ii). The Truth in Lending Act has an identical cap. 15 U.S.C. § 1640(a)(2)(B) (substituting "creditor" for "debt collector"). *See also* 15 U.S.C. § 1693m(a)(1)(B),12 U.S.C. § 4010(a)(2)(B), and 12 U.S.C. § 4907(a)(2)(B). Other laws, however, lack such upper bounds. See 15 U.S.C. § 1679g(a) (Credit Repair Organizations Act); 15 U.S.C. § 1667d

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ages suffered by any aggrieved plaintiff because of the statutorily defined wrong (a difficulty created by the wrongdoer's own prohibited activity)").

> (Consumer Leasing Act). The Fair Credit Reporting Act is in the cap-free group.
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> Maybe suits such as this will lead Congress to amend the Fair Credit Reporting Act; maybe not. While a statute remains on the books, however, it must be enforced rather than subverted. An award that would be unconstitutionally excessive may be reduced, *see State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), but constitutional limits are best applied after a class has been certified. Then a judge may evaluate the defendant's overall conduct and control its total exposure. Reducing recoveries by forcing everyone to litigate independently-so that constitutional bounds are not tested, because the statute cannot be enforced by more than a handful of victims-has little to recommend it.

Murray v. GMAC Mortgage Corp., 434 F.3d 948, 953-954 (7th Cir. 2006).[19] The excessiveness of any award would only be appropriate for review, as Judge Easterbook noted, should there ever be an aggregate class award following a jury's determination that defendants willfully violated FCRA. The possibility of such an award sheds no light on Congress's intent in using the term "willfully" in FCRA.

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[19] In *Murray*, the Seventh Circuit noted that the 2003 Fair and Accurate Credit Transactions Act ("FACTA") "abolishes private remedies for violations of the clear-disclosure requirement, which in the future will be enforced administratively, but that change does not apply to offers made before its effective date and thus does not affect this litigation." 434 F.3d at 950. FACTA similarly does not apply retroactively here. If the Court now tries to bail out petitioners who cannot avail themselves of FACTA by limiting the notice obligation or changing Congress's definition of willful, that "solution" will apply not only to t ese defendants, but also to future defendants who are already entitled to FACTA's protection. The result will be to undo the compromise approach taken by Congress of limiting the remedy without eliminating the notice obligation or changing the definition of willful.

F. There Is No Need to Consult Legislative History, But It Supports the Ninth Circuit's Definition of Willfulness.

"When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete." *Connecticut Nat. Bank*, 503 U.S. at 254, *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981). Because the meaning of "willful" is clear from its text and context of FCRA, there is no need to consult FCRA's legislative history.

Petitioners nevertheless argue that Congress must have considered willfulness to require a knowing violation because an initial bill contained a gross negligence standard for actual damages that was later reduced to a simple negligence standard in the enacted statute. Safeco Br. 25-26; GEICO Br. 33. It does not, however, follow that because Congress reduced the standard for actual damages from gross negligence to negligence in Section 1681o prior to enactment, it intended to increase the "willful" standard under Section 1681n to incorporate a knowing standard.[20]

In addition, as the United States' amicus brief points out, while some courts loosely grouped "gross negligence" and "recklessness" together, "most courts consider that 'gross negligence' falls short of a reckless disregard of consequences." U.S. Br. 16 (*quoting* W. Prosser, *The Law of Torts* § 34 at 183 (4th ed. 1971)); *see also Conway v. O'Brien*, 312 U.S. 492, 495 (1941) ("'Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the

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[20] The Conference Report noted that the "the House amendment to section 617, which was agreed to by the conferees would establish liability for actual damages sustained as a result of ordinary negligence, instead of only as a result of gross negligence as provided in the Senate bill." H. Rep. No. 91-1587 at 30 (1970). The political compromise of providing actual damages for negligence did not speak to Congress's intent with respect to willfulness. The Conference Report did not separately discuss willfulness beyond noting that it was the standard for recovering punitive damages under the Act. *Id.*

circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong.'") (*quoting Shaw v. Moore*, 162 A. 373, 374 (Vt. 1932)). There is no evidence in the legislative history that Congress equated "gross negligence" and "recklessness." Even if it did, however, the inference that would be drawn from the change from gross to simple negligence in section 1681o would be that Congress did not want to require plaintiffs to prove recklessness (or something closely approaching recklessness) in order to obtain actual damages, not that it wanted to require *more* than recklessness for the relief available under section 1681n.

GEICO and Safeco also point to alternative bills that proposed providing punitive damages based on either gross negligence or willfulness. H.R. 19403, § 52 , 91st Cong., 2d Sess. (1970); H.R. 19410, § 52, 91st Cong., 2d Sess. (1970). These bills were not considered by Congress; they never received any hearings and were not even reported out of Committee. *See* U.S. Br. 17, n 13. Moreover, these bills would have provided criminal liability for "whoever willfully violates any provision," (H.R. 19403, § 63, 91st Cong., 2d Sess. (1970); H.R. 19410, § 62, 91st Cong., 2d Sess. (1970)), but Congress ultimately added a more specific "knowingly and willfully" requirement to FCRA's criminal sections, indicating that willful violations were not limited to knowing violations. Thus, if anything can be gleaned from the proposed bills, it is that Congress understood that willful violations were not limited to knowing violations.

Safeco also contends that when Congress amended 15 U.S.C. § 1681n(a) to provide statutory damages, it implicitly incorporated four circuit court opinions that purportedly required actual knowledge. Safeco Br. 29. There are two flaws in this argument. First, the term "willfully" has been in section 1681n since FCRA's enactment in 1970, when section 1681n applied only to recovery of punitive damages. In 1996, Congress added new provisions in section 1681n(a)(1)(A) for statutory damages, but made no changes to the willfulness

standard. As of 1970, and continuing through 1996, it was commonplace that plaintiffs could recover punitive damages based on reckless misconduct.[21] Thus, to the extent that the meaning of "willfully" is not apparent from the text and context, the legislative history indicates that the enacting Congress in 1970 would have naturally incorporated the common recklessness standard necessary for punitive damages. *See Dixon v. United States*, 126 S. Ct. 2437, 2445 (2006) (construing statutory liability term "as Congress may have contemplated it" at the time of enactment).

Second, even if 1996 were a relevant date for determining Congress's intent, there was no "unanimous opinion" of circuit courts that rejected recklessness to prove a willful violation under FCRA. Of the four circuit court FCRA cases cited by Safeco on page 29 of their brief, none considers whether recklessness may be sufficient much less reject it for proof of willfulness under Section 1681n. Two, in fact, involve *other* provisions of FCRA that expressly require proof of knowledge.[22] Indeed, there have been only three circuit court cases that have discussed whether recklessness is sufficient to prove a willful civil FCRA violation and all occurred after the 1996 amendment. The Ninth Circuit in this case and the

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[21] *General Motors Acceptance Corp. v. Froelich*, 273 F.2d 92, 94 (D.C. Cir. 1959); *Varnish v. Best Medium Publishing*, 405 F.2d 608, 612 (2d Cir. 1969); *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91, 96 (2d Cir. 1967); *Citizens and Southern Nat. Bank of S.C. v. Dickerson, Inc.*, 370 F.2d 692, 696 (4th Cir. 1966); *Anderson v. Eagle Motor Lines, Inc.*, 423 F.2d 81, 84 (5th Cir. 1970); *Memphis Press-Scimitar Co. v. Chapman*, 62 F.2d 565, 567 (6th Cir. 1933); *Bucher v. Krause*, 200 F.2d 576, 584-85 (7th Cir. 1953); *Harrison v. Donnelly*, 153 F.2d 588, 591 (8th Cir. 1946); *Lampert v. Reynolds Metals Co.*, 372 F.2d 245, 247-48 (9th Cir. 1967); *Newman v. Nelson*, 350 F.2d 602, 604 (10th Cir. 1965).

[22] *See e.g., Zamora v. Valley Fed. Sav. & Loan Ass'n of Grand Junction*, 811 F.2d 1368, 1370 (10th Cir. 1987) (applying 15 U.S.C. § 1681q); *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 971-72 (4th Cir. 1987) (applying 15 U.S.C. § 1681q standard where a consumer report was obtained under false pretenses).

Third Circuit have permitted the use of recklessness to prove a willful violation under 1681n(a)(1)(A). GEICO Pet. App. 34a; *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997). The Eighth Circuit criticized the use of the reckless disregard standard in *dicta*, but this was not surprising because it ultimately concluded that the claim at issue arose under 15 U.S.C. §§ 1681n(a)(1)(B) and n(b), which expressly require proof of "knowingly" obtaining a consumer report without a permissible purpose. *Phillips v. Grendahl*, 312 F.3d 357, 365 (8th Cir. 2002); *but see Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998) (allowing punitives under FCRA for "trampling recklessly" on plaintiff's rights).[23]

In short, if there were any need to resort to legislative history, nothing in the history suggests Congress intended "willfully" to mean something different in FCRA than in other statutes, such as the ADEA and FLSA, which were enacted during the same period. *Northcross*, 412 U.S. at 428 (construing terms in similar statutes to have the same meaning).

G. The Rule of Lenity Does Not Apply.

Petitioners' reliance on the "rule of lenity" to bootstrap a civil willfulness standard into a higher criminal standard is unavailing. First, the rule of lenity applies only to interpretation of ambiguous statutes and, therefore, has no application here. *Bates v. United States*, 522 U.S. 23, 32-33 (1997); *Beecham v. United States*, 511 U.S. 368, 374 (1994). Indeed, this Court typically requires more than just "some" ambiguity to invoke the rule:

> The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. ("The mere possibility of articulating a narrower construction ... does not by itself make the rule of lenity

[23] Safeco also claims Congress adopted *dicta* from additional cases regarding the willfulness when enacting FACTA in 2003, but FACTA did not amend section 1681n or make any reference to willful violations.

> applicable"). "The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' ... we can make 'no more than a guess as to what Congress intended.'" To invoke the rule, we must conclude that there is a "'grievous ambiguity or uncertainty' in the statute."

Muscarello v. United States, 524 U.S. 125, 138 (1998) (citations omitted). In light of the text, context and prior case law interpreting the term willful in similar civil statutes, it cannot be said that the term is so ambiguous that this Court can only hazard a guess at Congress's intent.

Second, as Safeco concedes, the rule of lenity typically applies to criminal statutes. Safeco Br. 35 (citing *McNally v. United States*, 483 U.S. 350, 359-360 (1987)). Civil consumer protection statutes such as FCRA, by contrast, are generally construed broadly rather than narrowly. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1332 (9th Cir. 1995). Hence, the usual "recklessness" civil standard should apply. In *Thurston*, this Court noted that even the *criminal* provisions of the FLSA incorporated the standard of recklessness that the Court applied to the civil ADEA provisions before it. 469 U.S. at 126 (*quoting Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir), *cert. denied*, 342 U.S. 876 (1951)). Far from invoking the rule of lenity to apply a heightened criminal state-of-mind standard to a civil damages provision, as petitioners attempt, this Court in *Thurston* found a recklessness standard appropriate for *both* civil and criminal liability. 469 U.S. at 126.

GEICO cites one civil case in which this Court invoked the rule of lenity: *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992). In *Thompson/Center Arms*, the Court addressed an ambiguity over what it meant to "make" a "firearm." *Id.* at 513. Although the statute before it was civil, the court looked to the rule of lenity because the same conduct also carried criminal penalties with no additional scienter requirement; thus, the court's construction of the civil statute would also set a standard for criminal liabil-

ity in other cases. *Id.* at 518. Here, by contrast, the criminal provision has a separate and higher scienter requirement, requiring "knowing and willful" violation. 15 U.S.C. § 1681q. The rule of lenity is neither necessary to address any ambiguity nor to ensure a higher criminal scienter standard because that higher criminal standard already exists in FCRA.

H. The Ninth Circuit's Recklessness Standard Is Consistent With Established Tort Law and Properly Invites Inquiry Into Both Subjective and Objective Factors.

1 The Ninth Circuit's *dicta* regarding a potential advice of counsel defenses does not compel petitioners to invoke the defense.

Petitioners wrongly contend that the Ninth Circuit compelled them to raise the advice of counsel defense. GEICO Br. at 44-45; Safeco Br. at 42. The advice of counsel issue is a red herring as no advice of counsel appears in the factual record. In fact, GEICO and Safeco chose not to share their counsel's advice in opposing summary judgment and have made a tactical decision not to share that advice to this day. That is their choice. Respondents have never taken the position that petitioners must waive the privilege and provide evidence of counsel's advice in connection with respondents' affirmative case, but petitioners clearly may choose to offer the advice as part of any defense.

The Ninth Circuit also did not compel petitioners to waive the privilege, but merely stated, in *dictum*, that "in some cases" whether or not there is a finding of willfulness "may depend, in part, on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." GEICO Pet. App. 34a. This *dictum* was a direct response to GEICO's conclusory statements, unsupported by evidence, that it relied on

advice of counsel.[24] Petitioners similarly argue to this Court, again without record support, that they have acted in reliance on counsel. *E.g.*, GEICO Br. 48 (asserting without record citation that its interpretation of FCRA was "produced with the assistance of reputable counsel"); Safeco Br. 42 (falsely implying that the Ninth Circuit erred in rejecting Safeco's advice of counsel defense).

The Ninth Circuit's observation that a fact finder may determine willfulness based on the subjective intent of executives and on any legal advice offered (where the defendant chooses to inject legal advice into the case) is hardly extraordinary. *See American Med Sys Inc. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1531 (Fed. Cir. 1993) (discussing advice of counsel as relevant factor in proving willful patent infringement); *United States v. Wenger*, 427 F.3d 840, 853 (10th Cir. 2005) (discussing same in cases involving willful violation of federal securities laws). Nor is there anything erroneous in the Ninth Circuit's statement that conferring with counsel "may provide evidence of lack of willfulness, but is not dispositive." GEICO Pet. App. 34a. Indeed, that statement was an apt response to GEICO's self-serving affidavit in the summary judgment record that it had consulted with counsel about FCRA compliance, but not saying when the consultation took place, what facts were disclosed to counsel, or what

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[24] *See e.g.*, GEICO JA 22, ¶19. In addition, GEICO petitioned for reconsideration and argued, without factual support, that there was "no evidence" that GEICO "sought anything but sound, objective advice from its legal counsel regarding undecided legal questions." Appellees' Petition for Panel Rehearing and Rehearing En Banc (Ninth Cir. Case No. 04-35279), 11. The Ninth Circuit denied reconsideration, but added *dicta* regarding advice of counsel to leave open the possibility that petitioners could assert the defense on remand. Following remand from the Ninth Circuit, petitioners indicated that they would raise the defense, but they have not yet come forward with the advice on which they rely because the proceedings are stayed pending this Court's decision.

counsel's advice was.[25] GEICO JA 22, ¶ 19. It is well settled that merely referring to the fact that defendant consulted counsel cannot defeat a finding of willfulness. *Amsted Indus. Incorp*, 24 F.3d at 182. *See also Padilla v. Metro-North Commuter Railroad*, 92 F.3d 117, 124 (2d Cir. 1996) (holding that "the mere fact that Nelson may have consulted with Metro-North's legal department does not demonstrate that he acted in good faith[.]"); *Takecare Corp. v. Takecare of Oklahoma, Inc.*, 889 F.2d 955, 957-58 (10th Cir. 1989) (holding same); *United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992) (holding same).

To establish good faith reliance on counsel, defendants must show "(1) a request for advice of counsel on the legality of a proposed action, (2) full disclosure of the relevant facts to counsel, (3) receipt of advice from counsel that the action to be taken will be legal, and (4) reliance in good faith on counsel's advice." *Wenger*, 427 F.3d at 853. "[G]ood faith reliance on the advice of counsel, even when those factors are met, is not a complete defense to an allegation of willful misconduct, but is merely one factor a jury may consider when determining [defendant's] state of mind." *United States v. United Med. and Surg. Supply Corp.*, 989 F.2d 1390, 1403 (4th Cir. 1993); *see also United States v. Dardi*, 330 F.2d 316, 326 (7th Cir. 1964) (holding same). Even where these factors are met, the fact-finder may inquire into the quality of the advice received to determine whether a defendant's reliance was, in fact, in good faith. *Liquid Dynamics Corp. v. Vaughan Co., Inc.*, 449 F.3d 1209, 1226 (Fed. Cir. 2006).

Safeco goes even further and argues that the Ninth Circuit erred in its "refusal to recognize a complete advice-of-counsel defense" and exhibited a "presumption of bad faith

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[25] Among the information not provided by GEICO is whether the purported advice was received before or after GEICO's actions, or even whether it predated the litigation. An opinion obtained after the fact is irrelevant to willfulness. *Amsted Indus. Incorp. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 182 (Fed. Cir. 1994).

on the part of lawyers and clients that is unprecedented in the decisions of this Court and unwarranted as a matter of principle and policy" (Br at. 43). Safeco's argument is peculiar because (1) Safeco made no effort to raise the defense or offer advice of counsel in the lower courts; (2) Safeco cites no case where this Court or any court has recognized "a complete advice-of-counsel" defense; (3) it is commonplace that advice of counsel may be a factor considered in refuting, but not wholly negating, willfulness; and, (4) the Ninth Circuit merely (a) remanded the case for further consideration should Safeco choose to try to later raise such a defense and (b) compelled no inquiry into any advice of counsel. Petitioners' arguments that the Ninth Circuit compelled inquiry into advice of counsel or "presumed" bad faith are baseless.

Petitioners' reliance on *Thurston's* discussion of TWA's reasonable conduct and good faith is also misplaced. In *Thurston*, TWA presented substantial evidence of its attempts to comply with the ADEA immediately after its passage by designing a new retirement policy that complied almost fully with the Act. This evidence included TWA's consultations with attorneys *before* the unintentional violative conduct and changes in TWA's retirement policy as *a direct result* of that legal advice that brought TWA into substantial compliance with the ADEA for almost all of its personnel. 469 U.S. at 129-130. This Court concluded that TWA had merely "failed to focus specifically on the effect of each aspect of the new retirement policy for cockpit personnel." *Id* at 130.

In contrast to *Thurston*, petitioners do not cite any specific legal advice or explain its impact on their conduct. Nor did petitioners merely overlook a small subset of persons in an otherwise good faith attempt to comply with FCRA. Petitioners' intentional conduct removed most initial applicants from the protections of FCRA, thousands of consumers who were otherwise clearly covered by FCRA's plain terms. Further, while *Thurston* found no evidence of knowledge or recklessness, there is such evidence of petitioners' knowing or reckless conduct, as discussed in section III below.

2. The Ninth Circuit properly rejected a negligence standard.

The Ninth Circuit adopted a clear and common standard for a willful violation:

> We hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights of others or in reckless disregard of whether the policy [or action] contravened those rights."
>
> . . .
>
> In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. 1681n for willfully violating consumers' rights.

GEICO Pet. App. 31a, 34a (*quoting Cushman*, 115 F.3d at 227). By specifically relying on this Court's opinions rejecting a negligence standard to define willfulness, the Ninth Circuit made clear that its recklessness standard required more than negligence. GEICO Pet. App. 32a (*citing Hazen Paper*, 507 U.S. at 614 and *McLaughlin*, 486 U.S. at 134). The district court on remand could not possibly interpret the Ninth Circuit opinion to permit a negligence standard.

Despite this, petitioners and the United States selectively take words such as "reasonableness," "untenable," and "implausible" out of context to argue that the Ninth Circuit approved a negligence standard. The Ninth Circuit's descriptions of the types of highly unreasonable conduct that may satisfy a recklessness standard, however, is fully consistent with conventional definitions of recklessness. For instance, the court stated that "whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation." GEICO Pet. App. 34a. In stating that recklessness is dependent "in

part" on the *degree* of "unreasonableness" of the interpretation, the Ninth Circuit in no way stated that an interpretation that was merely unreasonable, but not reckless, constituted willfulness. It clearly rejected that position. GEICO Pet App 31a and 34a. Of course, an interpretation that is highly unreasonable at some point passes into recklessness and tort law defines recklessness based on this continuum:

> The usual meaning assigned to "willful," "wanton" or "reckless," according to taste as to the word used, is that the actor has intentionally done an act of *an unreasonable character* in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.
>
> . . .
>
> The result is that "willful," "wanton," or "reckless" conduct tends to take on the aspect of *highly unreasonable conduct*, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.

W. Prosser, *Law of Torts* § 34, at 185 (4th Ed. 1971) (emphasis added); *Prosser and Keeton on Torts* § 34, at 213-214 (5th Ed. 1984) (same); *cf. Carter v. Chicago Police Officers*, 165 F.3d 1071, 1081 (7th Cir. 1998) ("although a litigant could soundly argue that willful and wanton conduct should be considered unreasonable, the inverse is not necessarily true."). Taking words such as "unreasonable" or "implausible" out of context from the sentences in which they are used does not convert the Ninth Circuit's holding into adoption of a lower negligence standard.

The United States' proposed definition of "recklessness," in fact, differs from the Ninth Circuit's largely in the occasional use of different words that have nearly equivalent meaning. The United States observes that recklessness involves inquiry into whether there was an "obvious risk of unlawfulness" or conduct "outside the range of responsible

judgment" (U.S. Br. 23) while the Ninth Circuit similarly concludes that the decision "may depend in part on the obviousness or unreasonableness" of the erroneous interpretation and whether it reflects an "*implausible*" interpretation of the law. (GEICO Cert. Pet. 34a). The Ninth Circuit should not be faulted nor its decision vacated for occasionally choosing different adjectives to help describe the same standard.

Petitioners also inaccurately contend that the Ninth Circuit has prevented them from raising their good faith and purportedly reasonable attempts to follow FCRA. The Ninth Circuit directly stated that a company will *not* have acted recklessly if "it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has come to a tenable, albeit erroneous interpretation of the statute." GEICO Pet. App. 34a. Petitioners may provide evidence of such efforts on remand, but are not entitled to a presumption of good faith based solely on their legal arguments or vague and conclusory references to consulting "reputable" counsel (while hiding the actual advice given, the scope of engagement, and the conduct taken in response to that advice).

3. The Ninth Circuit properly invited the district court to consider subjective and objective factors on remand.

The Ninth Circuit properly stated that the district court on remand could consider both subjective and objective factors to determine whether there is a triable issue of fact as to willfulness. GEICO Pet. App. 34a. It is established tort law that proof of willfulness may include consideration of both subjective and objective factors. *Prosser and Keeton on Torts*, § 34 at 213-214 (5th Ed. 1984).

Proof that a defendant *knew* its conduct violated the law or *understood* that it was acting in the face of a substantial risk that its conduct violated the law obviously necessitates inquiry into the defendant's state of mind. *Farmer v. Brennan*, 511 U.S. 825, 838 (1994). These questions of "knowledge and belief are characteristically questions for the fact

finder, in this case the jury." *Cheek v. United States*, 498 U.S. 192, 203 (1991). "Willfulness is a question of fact for the jury, raising, as it does, issues of the employer's knowledge and understanding of the relationship between certain conduct and the legal requirements of the ADEA." *United States E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1250 (11th Cir. 1997).[26] Even in those limited cases where this Court has required proof of subjective, as opposed to objective, recklessness, a factfinder may infer from circumstantial evidence that a defendant had subjective knowledge of the high risk that his conduct violated others' rights based solely on the *obviousness* of the risk involved. *Farmer*, 511 U.S. at 842; *Herbet v. Lando*, 441 U.S. 153, 156-57 (1979). And even where a subjective standard applies, a defendant's conduct need not be "egregious" or "outrageous" (i.e., objectively extreme) if defendant acted with a reckless disregard of the law—that is, acted in the face of a "perceived risk" that its conduct violated the law. *Kolstad,* 527 U.S. at 536-37.

In civil tort actions, a plaintiff may also, in the alternative, prove willfulness or recklessness by demonstrating that a reasonable person in defendant's place would have been aware of an objectively high risk that its conduct violated the statute. *Farmer*, 511 U.S. at 838, *citing Prosser and Keeton on Torts*, § 34 at 213-214 (5th Ed. 1984). As Prosser explains, it is rare that a civil defendant will admit it understood its conduct violated the law, and evidence of such intent is typically based on inference:

> Since, however, it is almost never admitted and can be proved only by the conduct and its circumstances, an objective standard must of necessity in practice be ap-

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[26] *See also Hoechst Celanese Corp. v. BP Chemicals Ltd.*, 78 F.3d 1575, 1583 (Fed. Cir. 1996) ("[T]he issue of willfulness of wrongdoing is a question of fact, and was presented to the jury for decision."); *Smith v. Chase Group, Inc.*, 354 F.3d 801, 809 (8th Cir. 2004) ("The issue of willfulness is a question of fact to be determined by the jury.")

> plied. The 'willful' requirement, therefore, breaks down and receives at best lip service, where it is clear from the facts that the defendant, whatever his state of mind, has proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position . . . Reckless conduct takes on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care where a high degree of danger is apparent.

Prosser and Keeton on Torts, § 34 at 214. Similarly, in *Hazen Paper*, this Court noted that the "an employer's reluctance to acknowledge" unlawful conduct "should not cut against imposing a penalty," but that statutory damages may be imposed where "the employer more likely knows its conduct to be illegal." *Hazen Paper*, 507 U.S. at 617. Thus, a finding of willfulness may be based either on proof of subjectively knowing or reckless conduct, which a factfinder may infer from the obviousness of the risk of the violation, or, in the alternative, on objective factors showing that a reasonable defendant would have been aware of a high risk that its conduct violated the law.

Petitioners and the United States, however, argue that this Court must apply some objective standard, not as an alternative to inquiry into subjective knowledge or recklessness, but as a complete legal defense and a shield to *prohibit* inquiry into petitioners' subjective awareness or conduct reflecting on recklessness (e.g., petitioners' failure to follow FTC guidelines or even make an inquiry to the FTC to seek guidance on their illegal conduct). Petitioners and the United States inaptly rely on cases where courts presume the defendant's *immunity* and prevent subjective inquiry unless defendant has taken an "objectively baseless" litigation position. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (involving *Noerr-Pennington* antitrust immunity that can only be overcome by showing that a lawsuit was a "sham," meaning objectively baseless). The United States also relies on the qualified im-

munity standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), under which, for policy reasons including the need to avoid "excessive disruption of government," *id.*, government officials may not be held individually liable for damages unless their conduct violated clearly established law. *See also Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (*Harlow* immunity balances conflicting policies designed to protect government officials from "substantial social costs," including eliminating the risk that "fear of personal monetary liability and harassing litigation will unduly inhibit officials.").[27]

Civil defendants in common law and statutory tort cases are not given presumptions of immunity or similar policy protections that prevent inquiry into subjective intent. Here, a factual inquiry into defendant's intent and state of mind is at the heart of the proof of plaintiffs' affirmative case. It would be particularly unusual to prevent that inquiry where, as here, there is already substantial evidence that petitioners subjectively understood the substantial risk that their conduct violated the law. *See* Sec. III, *infra*. The immunity cases relied upon by the United States cannot prevent inquiry into respondents' subjective intent.

Even if purely objective factors could be used as a shield to prevent further inquiry into subjective intent, petitioners' litigation arguments are not objectively reasonable as a matter of law such that no reasonable juror could conclude that they did not recklessly violate FCRA. *See* Sec. III, *infra*.[28]

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[27] The federal qualified immunity standard, which is designed to *avoid* inquiry into defendant's subjective state of mind, provides a particularly poor analogy to a "willfulness" standard. By contrast, under state law immunity doctrines that turn on subjective factors such as willfulness or malice, "whether or not an officer acted willfully or maliciously is usually a question of fact to be resolved by the jury." *Craighead v. Lee*, 399 F.3d 954, 963 (8th Cir. 2005) (applying Minnesota immunity law); *Carter*, 165 F.3d at 1081 (7th Cir. 1998) (applying Illinois immunity law).

[28] GEICO argues that other insurance defendants, such as Hartford Fire and State Farm, concluded that the "adverse action" provisions did not apply to initial applications for insurance. GEICO Br. at 48, n 29, but this

(*Footnote continued*)

Indeed, the United States agrees that GEICO's interpretation of the "adverse action" provision "defies the statutory text and purpose." U.S. Br. 27. It concludes that "[b]y the statute's plain terms" GEICO took an adverse action against respondent Edo. *Id.* Oddly, the United States inconsistently argues that GEICO is entitled to a judgment as a matter of law without further inquiry into its subjective intent, even though the evidence presented below and that may be presented on remand confirms that GEICO understood at the time that it was taking "adverse actions" against consumers without notice and the FTC had, in fact, warned the industry about the very violations at issue in these cases.

The United States paradoxical position rests on the suggestion that a statute must be "pellucid," as opposed to merely plain on its face, and perhaps must be subject to prior court interpretation for any defendant to willfully violate it. U.S. Br. 29.[29] This view would give defendants' license to willfully violate any statute that has not been subject to prior interpretation and whose terms are clear, but not "pellucid."[30]

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assertion is not supported by the record in those cases. For instance, the record in *Hartford Fire* indicates that Hartford believed that it had to provide notice to initial applicants and actually did send a form of notice, albeit an inadequate one that did not mention that Hartford had taken any adverse action. *Hartford Fire Ins. Co. v. Reynolds*, No. 06-82. Hartford has settled its case and is awaiting approval of the class settlement.

[29] To the extent the United States argues that GEICO may reasonably have misunderstood the term "increase" in 15 U.S.C. § 1681a(k)(1)(B)(i), there is clearly no possibility that GEICO misunderstood the word "denial" in the same statute. It is undisputed that GEICO General denied Edo insurance based on review of his credit information. GEICO JA 80.

[30] In a similar vein, GEICO argues that punitive damages are not available if a legal theory is "novel or poorly recognized." GEICO Br. at 44, *citing Kolstad v. American Dental Ass'n*, 527 U.S. 526, 537 (1999). There is no issue of punitive damages in this case. Even if there were, *Kolstad* does not stand for a per se rule that prohibits a jury from considering defendants' knowledge or recklessness or removes this issue from a jury's consideration. *Kolstad* only states in *dicta* that a defendant *may* not be aware or reckless in its violation if the legal theory is novel (527 U.S.

(*Footnote continued*)

Such a novel approach would give license to GEICO and Safeco to willfully violate the statute even though (1) the FTC staff specifically instructed the insurance industry to provide notice to initial insurance applicants who did not get the lowest rate offered based on their credit score; (2) there was existing case law applying FCRA's adverse action provisions to other initial consumer transactions (*Mick v. Level Propane Gasses, Inc.*, 1999 WL 33453772 at *12 (S.D. Ohio 1999)); and (3) there is evidence that petitioners understood that they were taking adverse actions against consumers. *See* Sec. III, infra.

While there may be statutes that no reasonable person could understand or follow, the "adverse action" provision of FCRA, as demonstrated by the United States' own concise statutory analysis, is not one of them. Further, even if that the statute were not clear or subject to prior interpretation, the FTC has created a mechanism by which companies that genuinely sought to comply with the law could obtain guidance. Under 16 C.F.R. § 1.1:

> (a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, where practicable, under the following circumstances.
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> (1) *The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent*; or
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> (2) The subject matter of the request is of significant public interest.

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at 537), but that is an issue of fact typically addressed by the jury. Respondents do not contest that petitioners can present facts to the jury that they tried to comply in good faith with FCRA, but this is an issue of fact.

> (b) The Commission has authorized its staff to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted.

(Emphasis added.) A defendant is not subject to an FTC enforcement action if it acted in "good faith reliance on the Commission's advice under this section." 16 C.F.R. § 1.3. When Trans Union, a supplier of credit information, similarly argued that FCRA was too vague to be applied, the D.C. Circuit rejected the argument on the ground that Trans Union could have availed itself of 16 C.F.R. § 1.1 if it had any issue about the clarity of FCRA. *Trans Union Corp. v. Federal Trade Cmm'n*, 245 F.3d 809, 817 (D.C. Cir. 2001).[31] Thus, even if petitioners were unsure of the application of FCRA, they had an opportunity to seek clarification, but recklessly chose not to do so. Indeed, when Mr. Ball asked the FTC for such advice, the FTC advised insurance companies that failing to give an initial applicant the best available price based in part on credit is an adverse action. FTC Ball Letter. Petitioners also recklessly ignored this guidance.

Of course, petitioners remain free to argue on remand that the statute's text and the available guidance did not give them enough reason to believe they were violating the FCRA to render their conduct willful, but these are fact issues for a jury, not questions of law for this Court. *Farmer*, 511 U.S. at 842; *Cheek*, 498 U.S. at 203.

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[31] Even in criminal cases, where the vagueness standard is more protective of defendants, a statute is valid unless it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997). With all due respect to the district court, whose analysis ignores the plain text of the statute, FCRA is not a statute so vague that petitioners were left guessing at its meaning. Indeed, they did not have to guess because the FTC had already guided them on the appropriate answer.

II. GEICO TOOK AN ADVERSE ACTION AGAINST EDO UNDER THE PLAIN TEXT OF 15 U.S.C. § 1681a(k)(1)(B)(i).

The Ninth Circuit correctly concluded that GEICO and GEICO General took an adverse action against Edo under 15 U.S.C. § 1681a(k)(1)(B)(i) when they denied Edo insurance with GEICO General based in part on a review of his credit information. GEICO Pet. App. 28a-29a. Under section 1681a(k)(1)(B)(i), an adverse action includes a "denial . . . of any insurance[.]" Under section 1681m, if a person takes such "adverse action . . . based in whole or in part on any information contained in a consumer report," it must provide notice. It is undisputed that Edo was denied insurance with GEICO General based on a review of *his* credit information. Had Edo had better credit, GEICO would have insured him within GEICO General. GEICO JA 80.

According to GEICO's argument, GEICO only had to give notice if it would not also have denied Edo insurance if he had another hypothetical consumer's purportedly neutral or average credit score. GEICO's argument cannot be squared with either the words "denial . . . of any insurance" in section 1681a(k)(1)(B)(i) or the words "based . . . in part on any information contained in a consumer report" in section 1681m. FCRA requires notice if there was an "adverse action" taken based on a review of *Edo's* credit information in connection with the underwriting of *his* insurance regardless of how GEICO might have treated a different consumer with a hypothetically neutral or average credit score. 15 U.S.C. § 1681a(k)(1)(B)(i), 1681m. Regardless of this Court's ultimate interpretation of "increase" in section 1681a(k)(1)(B)(i), this Court should affirm the Ninth Circuit's conclusion that Edo suffered an adverse action when he was "denied" insurance with GEICO General based on a review of his credit information. There is no possible ambiguity with respect to the words "denial . . . of any insurance."

GEICO's tortured argument perversely permits GEICO General to review *any* consumer's credit file, reject him as a

result and *never* provide notice to a single consumer because GEICO General *only* provides the lowest cost insurance to consumers with better than average credit. GEICO's policy of providing notice only to consumers treated worse than they would have been treated if their credit scores were "neutral" will never result in notice to consumers denied coverage by GEICO General, because GEICO General does not insure consumers with average credit.[32] Congress could not have intended this absurd result when it gave companies like GEICO General the privilege to review confidential credit information with the associated responsibility to give notice when they used the information against consumers.

For the same reason, the Ninth Circuit also correctly concluded that GEICO took an "adverse action" under section 1681a(k)(1)(B)(i) when it "increased" Edo's charge for insurance by denying him access to the lowest cost carrier and placing him in the more expensive company GEICO Indemnity based on review of his credit information. GEICO Pet. App. 20a-21a. An adverse action under section 1681a(k)(1)(B)(i) includes "an increase in any charge for . . . any insurance . . . applied for, in connection with the underwriting of insurance." GEICO had to provide notice to Edo if this increase was made "based in whole or in part" on any information in Edo's credit report. 15 U.S.C. § 1681m(a). In connection with underwriting Edo's insurance, GEICO increased his charge for insurance based in part on review of his credit information. This is an "adverse action" under section 1681a(k)(1)(B)(i). This is also the common understanding of "increase" used in similar consumer credit notice statutes. *See Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001) (holding that charging a buyer of a car more

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[32] The Ninth Circuit correctly concluded that if a consumer would not have qualified for GEICO General even with the top credit score (for example, because his driving record disqualifies him), he has not suffered an adverse action based in part on credit. GEICO Pet. App. 21a, n 11.

if he pays with credit is an "increase" triggering TILA's disclosure requirements).

In addition, the FTC had specifically instructed insurance companies that an adverse action includes not offering the lowest rate to an *initial* applicant based on their credit score or not providing a discount available to other applicants with higher credit scores. FTC Ball Letter; *see also* 16 C.F.R. Part 601, Appendix C (stating that "'adverse action' is defined very broadly . . . and includes all business, credit and employment transactions affecting consumers that can be considered to have a negative impact").

GEICO argues that it did not take an "adverse action" against Edo because he would have been charged the same amount if his credit had not been considered and he was assigned a "neutral" credit score. As the United States notes, this argument is beside the point because GEICO had *already* used Edo's credit information against him by placing him in the more expensive carrier. U.S. Br. 26. FCRA requires notice when credit information is used "in connection with the underwriting of insurance" (15 U.S.C. § 1681a(k)(1)(B)(i)) and does not ask how consumers would have been treated if their credit information had *not* been used.

GEICO's argument not only contradicts the plain statutory text, but eviscerates the statute's stated purpose to ensure that businesses use accurate credit information in transactions with consumers. 15 U.S.C. § 1681(a)(1), (b). GEICO's strange interpretation *presumes* that it uses accurate credit information when underwriting a consumer's insurance. If a consumer's true credit information would qualify her for the lowest cost insurance, but GEICO has obtained inaccurate or dated information or information on another consumer due to identity theft, mistake or otherwise, GEICO will not provide notice if the consumer's placement or charge for insurance is no worse than the average consumer's placement or charge. Thus, GEICO can treat consumers adversely without providing notice even when they, in *fact*, qualify for the lowest rate. This practice eliminates FCRA's system of notice and checks

and balances, which allows consumers to confirm that the insurer is using *their* information (and not another consumer's credit information or credit scores driven down by identity theft) and that such information is accurate. As the United States amicus brief concludes, GEICO's argument defies the plain text and purpose of the statute.[33] U.S. Br. 27.

This Court need only review the text, context, and stated statutory purpose of FCRA to conclude that GEICO took an adverse action. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000). However, should it choose to review legislative history, the history supports the Ninth Circuit's holding with respect to the meaning of "increase." The Senate Report accompanying FCRA's original enactment stated that notice was required when a consumer was charged "higher rates" based on a review of that consumer's credit information. *See* S. Rep. No. 91-517, at 7 (1969) (providing that "those who reject a consumer for credit, insurance or employment or who charge a higher rate for credit or insurance wholly or partly because of a consumer report must . . . so advise the consumer[.]") When Congress added the specific definition of "adverse action" in 1996, it not only provided that "adverse action" included an increase of the charge for insurance based on credit information, but also stated that an adverse action occurred whenever any "outcome adverse to the interests of the consumer" followed a review of credit information. 15 U.S.C. §

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[33] The United States is even more dismissive of Safeco's argument that FCRA does not apply to increases in connection with initial insurance applications: Its brief dryly states that GEICO's concession that FCRA does apply to initial applications "was a wise one." U.S. Br. 25. Safeco, while trying to argue the issue in its merits brief, did not present the question in its petition for certiorari. Moreover, this Court has not granted certiorari on other petitions arising from the Ninth Circuit's decision that did present the initial application question. *See, e.g.*, State Farm Mutual Automobile Insurance Co's Petition for a Writ of Certiorari, No. 06-101. Safeco's argument that the statute does not apply to initial applications is not properly before this Court.

1681a(k)(1)(B)(iv)(II); S. Rep. No. 103-209 at 4, 8 (1993); H. Rep. No. 103-486 at 26 (1994). The legislative history also makes clear that Congress from the very inception of FCRA wanted to ensure that every consumer had the right to check to ensure that accurate information was being used against him in consumer transactions. 115 Cong. Rec. 33413 (Nov. 6, 1969) (Senator Bennet stating "I believe that every consumer is entitled to have the benefit of accurate information when decisions are made regarding his purchase of insurance, his employment, or the granting of credit to him.") The Ninth Circuit's definition of "adverse action" is consistent with Congress's intent that the term be interpreted broadly to include any negative impact on the consumer and to ensure that consumers have the opportunity to check if accurate credit information is being used against them.

GEICO relies on subsequent legislative text and history relating to the *separate* credit provisions of FCRA to contend that Congress did not intend to provide notices to consumers who did not receive the lowest cost insurance based on their credit information. *See* GEICO Br. 20-22, 23 (referencing testimony of FTC in connection with 2003 amendments to credit provisions of FCRA). The separate notice provisions for offers of credit have no application here.[34] In 2003, Con-

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[34] GEICO misleadingly cites testimony by FTC staff members that the FTC was concerned in 2003 about providing notices to too many people because not everyone has the best credit. *See* GEICO Br. 23. The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs, 108th Cong. 529 (2003) at 528-529. This testimony was given in connection with 2003 FACTA amendments that changed the "adverse action" definition only with respect to credit. In fact, FTC staff member Joel Winston acknowledged in the same testimony in response to a question from Senator Sarbanes regarding whether a consumer should be provided notice if they did not get the lowest interest rate offered by a bank that "[u]nder current law, it would require an adverse action notice if you got less favorable terms unless there were a counteroffer that you accepted in the credit situation." *Id.* at 528.

gress amended 15 U.S.C. § 1681m(h) to provide solely for credit transactions, and not insurance, that when a creditor grants credit on "terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers," that creditor must provide the consumer with a so-called "risk-based pricing notice" that is defined by FCRA and implementing regulations. As the FTC explained to the Ninth Circuit, these amendments were necessary because of the more limited definitions of "adverse action" that applied to offers of credit before 2003. *See* FTC Amicus Brief in *Spano v. Safeco*, No. 04-35313 (9th Cir.), at 27, n 14. "Because . . . the FCRA contains a much broader definition of adverse action in the context of insurance transactions, no similar amendment to expand that definition was necessary." *Id.* If anything, Congress's decision to *expand* the definition of adverse action for credit transactions in 2003 to bring it closer to the expansive definition already applicable to insurance transactions[35] confirms the correctness of the Ninth Circuit's ruling. In any event, Congress's decision not to touch the definition applicable to insurance transactions while altering the definition for credit transactions suggests that Congress did not intend to affect the definition of "adverse action" in connection with initial insurance applications.[36]

Finally, GEICO says providing notice would require "almost metaphysical abstraction." On the contrary, explaining the "adverse action" would require one simple sentence:

> Dear Insurance Applicant: Based on a review of your credit information, you were denied insurance with

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[35] Even if the standard applicable to credit transactions did apply here, GEICO's treatment would still be "adverse" because GEICO treated Edo less favorably than a substantial number of customers whom it places with GEICO General.

[36] GEICO also relies on separate text and legislative history relating to the use of consumer reports in reviews of existing accounts and in so-called "pre-screened" offers. *See* 15 U.S.C. § 1681a(l) and 1681a(m). Neither provision is at issue here.

> GEICO General, our preferred insurer that offers the lowest rates, and you were then placed in a more expensive policy with GEICO Indemnity.[37]

It would then be up to the consumer to determine whether GEICO consulted accurate credit information or what would be necessary to obtain the lower rate. GEICO's contentions that such notices will only confuse consumers and that their effect would be diluted by a tidal wave of notices did not prevent GEICO from sending revised adverse action notices to all consumers who did not get the best available rate due to credit starting in December 2002. GEICO JA 42, 48-49.

III. THIS COURT SHOULD REMAND THESE CASES TO ALLOW CONSIDERATION BY THE DISTRICT COURT OF A COMPLETE FACTUAL RECORD.

This Court should affirm the Ninth Circuit's judgment to remand these cases to the district court to apply the willfulness standard to a more developed factual record, now including consideration of documents that GEICO belatedly produced after summary judgment. Petitioners ask this Court to be the first court to rule on their summary judgment motion on the issue of willfulness and the first to consider any factual record. Because the district court ruled on other substantive issues and did not rule on the willfulness issue (*See* Safeco Pet. App. 22a, n5; GEICO Pet. App. 44a-47a), it is appropriate for that court to do so in the first instance. Further, petitioners did not seek certiorari on the question of application of the legal standard to the facts, but only asked this Court to define the standard for willfulness, and, in GEICO's case, to determine whether Edo's treatment constituted an adverse action. GEICO Cert. Pet. at i; Safeco Cert. Pet. at i.

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[37] 15 U.S.C. § 1681m(a)(2), (3) provide other specific requirements for the "adverse action" notice, including, among other things, information regarding the consumer reporting agency and its role in the process and the consumer's right to obtain a free credit report to review the information used.

If this Court nevertheless decides to be the first to rule on petitioners' summary judgment motion and apply the willfulness standard to the as-yet not fully developed factual record, this Court should deny petitioners' request for summary judgment. The issue of willfulness is traditionally a fact issue to be resolved by the jury. *Cheek*, 498 U.S. at 203; *Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d at 1250. Giving respondents the benefit of all inferences, there are disputed issues of fact that prevent summary judgment. A reasonable juror could conclude based on the totality of circumstances that petitioners were either subjectively aware of FCRA's requirements or recklessly ignored a high risk that their conduct violated FCRA. A reasonable juror could so conclude based on both direct and circumstantial evidence indicating a high risk that was plainly obvious to petitioners.

The plain text of FCRA informed these insurers that it applied to a "denial" of insurance and "an increase in any charge for . . . any insurance, existing or applied for. 15 U.S.C. § 1681a(k)(1)(B)(i). The FTC told insurers FCRA applied to all "business, credit, and employment actions affecting consumers that can be considered to have a negative impact" (16 C.F.R. Pt. 601, App. C) and specifically informed insurers in March 2000 that it was an adverse action if "the applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report were more favorable." FTC Ball Letter.

Indeed, petitioners had the ability to obtain such specific guidance, just as Mr. Ball did for his insurance client, if they thought their conduct might not violate the statute, but chose not to seek any guidance. 16 C.F.R. § 1.1. Rather than inquire whether their conduct violated the law (which should have been apparent from the statute alone), they recklessly chose to ignore FTC guidance and the safe haven that such guidance might have provided them.

Deposition testimony as well as GEICO's own internal documents demonstrates that it understood as far back as 1998 that it was an "adverse action" to place an applicant in a

less--preferred company or tier based on credit.[38] In fact, GEICO "always" understood this to be the case. GEICO JA 49. And GEICO falsely represented to the Oregon Insurance Division that there was no difference between how it treated so-called "neutral" "no-hit" consumers and the consumers who had the "best credit scores." GEICO JA 58.

Both GEICO and Safeco also misleadingly and without further explanation informed the Oregon Insurance Division that "all applicants" for insurance, including those charged "higher rates" received notice if the underwriting decision was based on credit. GEICO JA 58; Safeco JA 52. This representation to government officials was false and incomplete because Safeco did not send notice to *any* initial applicant who received a higher rate and GEICO only did so in limited circumstances where the rate was higher than the rate GEICO would have charged an "average" consumer and not when it was higher than the rate that the applicant would have qualified for with better credit.

Safeco, despite being aware that the FTC's website and other materials offered compliance guidance, chose to proceed despite specific FTC guidance that FCRA applied to charging an initial applicant a "higher premium" based on credit. Safeco JA 69 (informing Safeco employees that the FTC website provided a "good resource" for information on what insurers needed to know); Safeco JA 65 (FTC pamphlet informing insurers that, charging a consumer a higher rate based in part on credit is an "adverse action" under FCRA).

In addition to the fact issues demonstrating subjective intent, a reasonable juror could conclude based solely on objective factors that a reasonable company in petitioners' position

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[38] As explained above, *see supra* n. 7, the document referenced was belatedly produced, and we have sought leave to lodge it with the Clerk's Office not so that this Court can decide the issue of willfulness, but to illustrate that any factual issues concerning GEICO's subjective intent, under whatever willfulness standard the Court ultimately adopts, are properly litigated in the courts below, on a complete record.

would have understood the objectively high risk that its conduct was unlawful. Specifically, a juror could find that petitioners ignored an objectively high risk that they were violating the law based on (a) the plain terms of FCRA that apply to a "denial" or "increase" in a charge for an initial applicant's insurance when that adverse action is based in part on the applicant's credit information, (b) the specific guidance provided by the FTC, and (c) petitioners' decision to proceed without seeking guidance from the FTC. Ultimately, these fact issues should be resolved first by the trier of fact, not this Court—particularly given that they are not fairly comprised within the questions on which this Court granted certiorari.

CONCLUSION

For the reasons stated above, the Ninth Circuit's judgment should be affirmed and these cases should be remanded for further proceedings.

Respectfully submitted,

SCOTT A. SHORR
Counsel of Record
N. ROBERT STOLL
ROBERT A. SHLACHTER
STEVE D. LARSON
STOLL STOLL BERNE LOKTING
& SHLACHTER, P.C.
209 Southwest Oak Street
Suite 500
Portland, Oregon 97204
(503) 227-1600

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Respondents

Date: December 2006

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IN THE
Supreme Court of the United States

GEICO GENERAL INSURANCE COMPANY, GEICO INDEMNITY COMPANY, and GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Petitioners,

v.

AJENE EDO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Robert D. Allen
Meloney Cargil Perry
Jay F. Utley
Brandon P. Long
Baker & McKenzie LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 978-3000

Maureen E. Mahoney
Counsel of Record
Richard P. Bress
Eric S. Volkman
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Petitioners GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company

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INTRODUCTION

Edo strains to dissuade this Court from reaching the question whether GEICO's interpretation of the adverse-action notice requirement is so unreasonable that it could support a claim of a willful violation. His strategy is understandable, because regardless of whether this Court agrees with GEICO's interpretation or whether willfulness is equated with reckless disregard, GEICO's conduct was not willful as a matter of law.

Edo concedes that the notice requirement's "based on" formulation requires a determination whether consideration of the credit report was the but-for cause of the insurer's adverse action. In ordinary usage, this but-for test should focus (as GEICO did) on whether the consumer was treated worse than if the insurer had not considered his credit report. Edo's alternative focus on how the consumer would have been treated if he had perfect credit is a decidedly peculiar application of the but-for test. It is also at odds with the statute's structure and history—which Edo essentially ignores.

Edo relies almost exclusively on what he claims to be Congress's primary purpose of alerting consumers to potential errors in their credit reports. But it is by no means clear that Congress wanted insurers to send notices to consumers whenever perfect credit scores would have resulted in better rates. Indeed, we know Congress did not impose such expansive notice obligations on credit providers, whose duties the statute sets forth in greater detail. And Edo's view necessarily applies to use of all consumer reports—not just credit reports. Thus, an employer would be required to send an adverse-action notice whenever it denies a job application and a consumer report revealing the "best possible" employment history would have landed the applicant a job. It is doubtful Congress had that in mind.

Even if this Court were to adopt Edo's view of the adverse-action notice requirement, however, his argument that GEICO could be found willfully noncompliant rings

hollow. To begin with, he fails to explain why recklessness should suffice to prove willfulness under 15 U.S.C. § 1681n(a) when (as he concedes) willfulness means an intentional violation of a known legal right in §§ 1681q and r. Edo's attempt to overcome that problem with selective citations to cases interpreting different statutes and structural arguments from other FCRA provisions is unavailing, because the meaning of willfulness varies depending on its particular statutory context and his structural arguments create more anomalies than they solve. At most, Edo demonstrates that the meaning of "willful" in this context is uncertain—which principles of lenity resolve in favor of the more culpable *mens rea*.

The Government, which also disputes GEICO's interpretation of the notice requirement and believes that "willful" means reckless, concedes that GEICO's notification policy was sufficiently well-grounded that its conduct cannot be deemed willful. Resisting that conclusion, Edo insists that the lower courts must be permitted to consider GEICO's subjective awareness of the risk that it was acting unlawfully. But this Court's precedents establish that proof of reckless disregard requires a demonstration both (i) that there was an objectively high and excessive risk that GEICO's conduct was unlawful *and* (ii) that GEICO was aware of that risk. A finding that the law was too unclear to label GEICO's interpretation groundless eliminates any need to explore GEICO's state of mind.

Although Edo protests that precedent and agency guidance should have alerted GEICO to a high likelihood that its notification policy was noncompliant, the Government correctly observes that, at the relevant time, no court had ruled on the issue and the FTC had issued no authoritative interpretation. Even if this Court decides that GEICO was in error, given the district court's agreement with GEICO's position, its conduct cannot be deemed willfully noncompliant as a matter of law.

In a last-ditch attempt to avoid that conclusion, Edo claims that disputes over material facts preclude summary

judgment and that GEICO's questions presented did not invite this Court to apply the law to the facts of this case. Neither objection has merit. Edo's newly manufactured factual issues are both spurious and irrelevant: none affects the objective and purely legal question whether GEICO's policy violated clearly established law. And GEICO's petition for certiorari did request this Court to apply the correct legal standard to the undisputed facts and in so doing give appropriate guidance to the lower courts.

ARGUMENT

I.A. Edo insists that GEICO treated him "adverse[ly]" under § 1681a(k)(1)(B). Resp. Br. 51-52. That is far from obvious,[1] but in any event it begs the question, because FCRA required a notice only if an adverse action was "based in whole or in part on" Edo's credit report. 15 U.S.C. § 1681m(a). This formulation requires proof of a but-for causal relationship between an adverse action and GEICO's consideration of the credit report. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (interpreting "because of" in the ADEA to mean that the illicit factor had a "determinative influence on the outcome").[2]

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[1] Contrary to Edo's argument, "increase" denotes a departure from preexisting treatment (Safeco's interpretation) or perhaps from how the individual would be treated absent consideration of a specified factor (GEICO's view). An insurance company has not "increased" an individual's rate just because it would have offered a lower rate if the individual had a better credit report. And while GEICO did not separately challenge the meaning of "denial" in its petition, whether placement of Edo with GEICO Indemnity constituted a denial by GEICO General is certainly a question on which reasonable minds can differ. *See* Pet. App. 45a (district court finding no denial); Pet. App. 29a (court of appeals finding denial); *see generally* AIA Br. 10-13 (addressing the issue in greater detail).

[2] The Government's contrary citation to *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995), is unavailing. The Court in that case appreciated that the ADEA imposed a but-for causal standard, but focused on a different issue—the effect of an employer's later discovery of a fact that would have justified the employer's action had the employer known of the fact at the time of its action. *Id.* at 356, 360-63. In contrast, GEICO would have established the same premium for Edo, based on the information available at the time, even if it had not

Edo concedes that the statute's "based ... on" formulation imposes a but-for test. Resp. Br. 51. But whereas GEICO asked how it would have treated Edo but for consideration of his credit report, Edo asks how GEICO would have treated him if he had a better credit report. Rather than comparing Edo's application as it is with the same application absent consideration of his credit report, Edo's but-for yardstick is a hypothetical application in which he has improved credit. Edo identifies no precedent for his novel conception of but-for causation.[3] If Congress had shared Edo's vision, it could have articulated his standard in a far more straight-forward manner. Several states have done just that.[4]

B. Edo does not seriously engage GEICO's arguments based on the structure of the statute. Instead, he simply proclaims that his reading of the adverse-action notice requirement would better achieve Congress's desire to alert consumers to potential errors in their credit reports. But statutory construction is not advanced by simplistic proclamations about supposedly predominant legislative purposes that ignore the reality of compromises among competing concerns. An appreciation of those competing concerns here belies Edo's insistence that Congress *must* have shared the Ninth Circuit's myopic view.

1. Edo attempts to brush aside FCRA's treatment of the use of consumer reports in reviews of existing customer accounts as not "at issue here." Resp. Br. 56 n.36. But Congress's treatment of existing consumer accounts

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considered the report.

[3] *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001), is inapposite, because the Truth In Lending Act (TILA) expressly compares the prices charged cash purchasers with the prices charged credit purchasers. TILA's causal "baseline" is perfectly clear.

[4] *See, e.g.*, 18-900-906 Del. Code Regs. § 4.1.2 (defining adverse action to include "[c]harging a higher insurance premium than would have been offered if the credit history or insurance score had been more favorable"); Utah Admin. Code r.590-219-3(2)(b) (defining adverse action to include "charging a higher premium than would have been offered if the credit history or credit score had been more favorable").

provides a strong indication of its likely intent concerning initial account applications. The Senate Report explained that no adverse-action notice is required "where a creditor obtains consumer reports on its customers in connection with a review of its credit or other portfolio and, in connection with the review, a consumer's account is not changed, or is changed in a way that is not less favorable to the interest of that consumer, *even if the accounts of other consumers are changed in a more favorable manner.*" S. Rep. No. 104-185, at 32 (1995) (emphasis added). In other words, there has been no adverse action based on a credit report simply because one existing customer is given more preferable terms than another based on superior credit. There is no reason to interpret FCRA to treat new customers differently. In both circumstances, the adverse-action determination should be made by assessing the impact an individual's actual credit report had on *that person's* insurance.

Edo gives similarly short-shrift to the 2003 FACTA Amendments, which for the first time required notice to consumers who, based on their credit information, received less favorable terms than other consumers. Edo argues that this amendment "expand[ed] the definition of adverse action for credit transactions" to bring credit providers' notice obligations in line with those of other users of credit reports. Resp. Br. 56. The obvious problem with that response is that Congress did not treat these new risk-based notices as adverse-action notices; FACTA did not alter FCRA's definition of adverse action or its adverse-action notice requirement. Moreover, if Edo were right, Congress could have achieved its goal simply by removing § 1681a(k)(1)(A)'s reference to the ECOA definition, since in Edo's view the "miscellaneous" provision in § 1681a(k)(1)(B)(iv)(II) already incorporates a far more comprehensive notice requirement.[5]

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[5] Edo relies half-heartedly on the miscellaneous clause, which defines as adverse action any "action taken or determination that is... adverse to the interests of the consumer." But that clause has no application to contexts (such as insurance) for which adverse action is distinctly and

2. Edo protests that GEICO's interpretation of the adverse-action notice requirement fails to achieve Congress's purpose of alerting all consumers to the possibility that potential errors in their credit reports may have affected their terms or rates. His poster child is a hypothetical consumer whose average or above-average credit score has not adversely affected his rate, but who would have received an even better rate if the insurer learned that the credit report was wrong and the consumer in fact had a perfect credit record. Resp. Br. 17. But there is no evidence that Congress instituted the adverse-action notice requirement to inform the vast majority of consumers that a better credit report would produce greater discounts or more favorable terms. Given the nature of the statutory bargain—under which use of credit reports is accompanied by an obligation to advise consumers when that use has adversely affected them—it is more reasonable to suppose that Congress required adverse-action notices only where the user can determine that the credit report actually harmed a consumer.

Edo's interpretation is also flatly contradicted by Congress's treatment of credit providers. Under ECOA, a consumer who accepts an offer of credit at terms less favorable than those applied for does not suffer an adverse action, even if the applicant would have received more favorable terms with a better credit report. 12 C.F.R. § 202.2. Therefore, regardless of the proper interpretation of adverse action in the insurance context, FCRA's notice provision *already* does not capture every instance in which a

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comprehensively defined. *See Nat'l Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("[S]pecific statutory language should control more general language when there is a conflict between the two."); *cf. Varity Corp. v. Howe*, 516 U.S. 489, 490 (1996) ("catchall" in ERISA § 502 was intended "as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 *does not elsewhere adequately remedy*") (emphasis added). Moreover, even in contexts (like rental decisions) where the miscellaneous definition of adverse action applies, it sheds no light on when such adverse actions are "based ... on" consideration of a credit report.

potential inaccuracy could, under respondents view of the statute, "adversely" impact a consumer.

Edo's view of the notice provision would also produce absurd consequences in the employment context. Edo forgets that his "best possible" consumer report standard must necessarily apply to any user's consideration of any type of consumer report, including education verifications, employment verifications, and claims and driving record checks.[6] Thus, under Edo's interpretation, whenever an employer would have hired an applicant if, for example, they had gone to the "best possible" law school or had held the "best possible" previous job, that employer is required to send the disappointed applicant an adverse-action notice. Of course, there are sometimes errors in consumer reports, but it seems highly unlikely that these are the situations with which Congress was concerned, and hard to imagine that Congress meant to achieve 100% accuracy at the cost of requiring adverse-action notices every time the "best possible" consumer information would have made a difference.[7]

Edo also underestimates the confusion that would be sown by sending adverse-action notices to individuals who were unaffected or actually *benefited* by the consideration of their credit reports (*i.e.*, individuals with high but not perfect credit scores). Resp. Br. 56-57. In many situations, such notices would be misleading and their ubiquity would desensitize recipients to their message. The Government glibly retorts that GEICO and other insurers can avoid those difficulties by refraining altogether from using credit reports. U.S. Br. 28-29. But in enacting FCRA, Congress recognized the benefits that flow from the sharing of consumer information.[8] The Act should not be read to put

[6] Nat'l Consumer Law Center, *Fair Credit Reporting* 20-21, 32-33 (5th ed. 2002).

[7] The difficulties in quantifying what "best possible" means with respect to various types of information that are contained in consumer reports also demonstrates the fallacy of Edo's approach.

[8] These benefits include rapid qualification for mortgage, automobile, and retail credit; higher levels of home ownership; more accurate pricing

insurers and other users of consumer information to the Hobson's choice of foregoing those benefits or sending a massive number of misleading "adverse-action" notices.

II.A. Both Edo and the Government acknowledge that the term "willfully" in §§ 1681q and r refers to knowingly unlawful conduct. Yet they read the term to mean "reckless disregard" *in § 1681n(a)*—despite this Court's teaching that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). Their attempt to splinter "willfully" into separate civil and criminal meanings within the same statute rests on unjustified generalizations from selective precedents and equally unjustified inferences from FCRA's statutory structure. At best, they prove that the statute is not a model of consistency, but even then their argument founders on principles of lenity.

1. The meaning of "willfully" in each case depends on a close examination of its statutory context, *Bryan v. United States*, 524 U.S. 184, 191 (1998), and that truth defies the Government's attempt to forge a bright-line presumption from disparate decisions decided on their particular facts. The Government's claim that Congress has a "long tradition" of employing willfulness as reckless disregard to "induce ... adherence to the obligations of federal law" is in that respect a vast overstatement. U.S. Br. 10. For example, this Court has held that "willful" failures to comply with the Internal Revenue Code, *Cheek v. United States*, 498 U.S. 192, 201 (1991), federal firearm licensing regulations, *Bryan*, 524 U.S. at 196, and currency structuring laws, *Ratzlaf*, 510 U.S. at 149, *all* require a defendant to know it was violating the law.

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of credit based on risk; and increased availability of non-mortgage credit for low-income households. H.R. Rep. No. 108-263, at 23 (2003). According to Congress, these benefits have saved consumers as much as $100 billion annually. *Id.* Notably, in November, 2006, Oregon voters overwhelmingly rejected a ballot initiative that would have banned the use of credit history by insurers. *See Oregon Voters Defeat Credit Scoring Ballot Measure*, Insurance Journal, Nov. 8, 2006, *available at* http://www.insurancejournal.com/news/west/2006/11/08/74099.htm.

Edo also errs in urging this Court reflexively to transplant the reckless-disregard standard from the ADEA and the Fair Labor Standards Act (FLSA) into § 1681n(a) of FCRA. Resp. Br. 25-27. He ignores the unique legislative history that drove this Court's conclusions about those statutes in *Thurston* and *Richland Shoe* and the far more punitive consequences that attend a "willful" violation of FCRA. And to the extent he emphasizes that the willfulness provisions of the ADEA and FLSA were enacted only a few years before the willfulness provisions of FCRA, Resp. Br. 28, he neglects to mention that the willfulness provision at issue in *Ratzlaf* was passed *by the same Congress* and *in the same legislation* as FCRA. *See* Pub. L. No. 91-508, 84 Stat. 1114 (Oct. 26, 1970).[9]

2. In addition to defying the canon against inconsistent construction of the same term in the same statute, Edo's structural arguments invert the meanings of "knowingly" and "willfully" in an unprecedented way: this Court has consistently read "willfully" to require *more* than "knowingly" when both terms are employed in the same statutory scheme. *See, e.g., Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006).

Edo's approach also would have the strange result of grounding liability for a violation of § 1681m(a)'s technical notice requirement on a lesser showing of *mens rea* than that required to prove a false pretense violation under § 1681n(a)(1)(B). Edo defends this result by insisting that notice violations were "more central to Congress's concerns," Resp. Br. 23 n.12, but that is unlikely since, in contrast to a false pretenses violation, a violation of the notice requirement is not criminally punishable. Nor does

[9] The Government's citation of circuit court cases interpreting statutes other than FCRA in which "willfully" has been read to mean reckless disregard (U.S. Br. 11) are far less persuasive than the circuit courts that have read "willfully" *in § 1681n(a)* to require an act that the defendant knows to violate the law. GEICO Br. 26 n.16 (collecting cases). Particularly unpersuasive are the Government's references to cases interpreting Title VII and the Americans with Disabilities Act, *which use the term "reckless"—not "willful."* U.S. Br. 11-12.

the notice provision provide the exclusive or even primary vehicle through which the statute accomplishes its purpose of ensuring "accuracy and fairness of credit reporting."[10] *Id.* (citing 15 U.S.C. § 1681(a)).

Edo's principal structural argument is his claim that the use of "knowingly" to modify "without a permissible purpose" in § 1681n(a)(1)(B) would be superfluous if a "willful[] fail[ure] to comply" in § 1681n(a) already requires proof that the defendant violated a known duty. Resp. Br. 19. But "knowingly" is not superfluous if understood to refer to "factual knowledge," as this Court has often held in statutes where the term is paired with "willfully." *See Bryan v. United States*, 524 U.S. at 192. Moreover, this usage is perfectly consistent with how the term is employed in §§ 1681q and r.

Of course, "factual knowledge" that one is acting "without a permissible purpose" implies knowledge of what purposes are permissible, which overlaps but is not coterminous with the willfulness requirement that one know his conduct is unlawful. Congress may well have chosen to use the term "knowingly" in § 1681n(1)(B), instead of "willfully," to make it clear that a consumer could recover damages under 1681n when a report was obtained under false pretenses (or for an impermissible purpose), without proof that the defendant harbored the "willful intent to injure" that is generally required by 15 U.S.C. § 1681h(e) for actions in the nature of invasion of privacy, "except as provided in sections 1681n and 1681o." 15 U.S.C. § 1681h(e); *see also* § 1681t(b) (explaining scope of state law preemption). In any event, its language is entirely consistent with § 1681n(a)'s graduated penalty scheme: under § 1681n(a)(1)(A), a defendant is liable for statutory damages of between $100 and $1000 for knowingly violating *any provision of the Act*, whereas under § 1681n(a)(1)(B), a defendant is liable for greater statutory damages of no less than $1000 for acting in a way he knows violates *§ 1681b(a)*

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[10] *See, e.g.*, 15 U.S.C. §§ 1681b, 1681e, 1681g, 1681i.

(which enumerates the permissible purposes for which a consumer report may be obtained). Section 1681n(a)(1)(B)'s harsher sanction derives from its narrow focus on conduct that Congress adjudged particularly culpable—an interpretation confirmed by the Act's criminal punishment of that specific misconduct. *See* § 1681q.

Contrary to the Government's assertion, moreover, recklessness fits at least as naturally under 1681o (negligent noncompliance) as under 1681n(a). U.S. Br. 15-16. Our legal system typically groups negligence and recklessness together as "general intent," while separately classifying knowing or intentional behavior as "specific intent."[11] Here, the difference between merely reckless conduct and conduct undertaken with an intent to violate the law corresponds with the distinction between actual damages and potentially ruinous statutory and punitive damages.

At best, Edo's structural arguments identify imperfections in FCRA's scheme that create ambiguity. But ambiguity in this case invites application of principles of lenity to § 1681n(a)'s *mens rea* requirement in light of the "quasi-criminal" nature of the punitive and statutory damages authorized by that section, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001), and the statute's use of the same "willful" standard in the Act's criminal provisions, *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992) (applying lenity in interpreting civil statute that employs same material term as criminal provision).[12]

Contrary to Edo's view, constitutional doubt also militates for a higher *mens rea* given § 1681n(a)'s provision for punitive and unbounded aggregate statutory damages without proof of any actual harm. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 574-75 (1996) (disproportionate punitive

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[11] Richard G. Singer, *The Proposed Duty to Inquire as Affected by Recent Criminal Law Decisions in the United States Supreme Court*, 3 Buff. Crim. L. R. 701, 729 n.75 (2000).

[12] Penalty provisions are generally "strictly construed." *See, e.g., Ivan Allen Co. v. United States*, 422 U.S. 617, 627 (1975).

damages requires a greater showing of reprehensibility); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (same). Edo's retort that he has foresworn punitive damages and that no class has yet been certified ignores this Court's teaching that the doctrine of constitutional doubt applies *"whether or not [the] constitutional problems pertain to the particular litigant before the Court."* *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (emphasis added).

While, as Edo notes, Congress and the common law have authorized punitive damages for reckless conduct, they rarely if ever do so in an uncapped fashion, absent actual harm, where the violation is a technical one.[13] And contrary to Edo's suggestion, the provision of punitive damages for a reckless failure to send an adverse-action notice would be anomalous given the unavailability of punitive damages for the violation of a variety of important federal rights, including intentional violations of civil rights laws.[14]

B. Even if willfulness meant recklessness, however, it would in this context require a showing that GEICO disregarded an objectively high and unjustifiable risk that its conduct was unlawful. *See Farmer v. Brennan*, 511 U.S. 825, 836 (1994). The obviousness of the risk that GEICO's

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[13] ECOA and Title VII both limit the amount of punitive damages recoverable under statute. *See* 15 U.S.C. § 1691e(b); 42 U.S.C. § 1981a(b)(3). The civil rights statutes proscribe the deprivation of rights enshrined in the Constitution, the violation of which is inherently reprehensible. *See, e.g., S. Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001, 1011 (9th Cir. 2005) (discrimination is "a special area of public concern where affront to human rights may require high punitives"). And environmental statutes provide for statutory or punitive damages to deter conduct that creates a risk of serious and widespread harm. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7413(b) (providing civil penalties of up to $25,000 per day per violation). All of the other statutes upon which Respondents rely require actual damages as a predicate to recovery of punitive or statutory damages.

[14] *See, e.g., Barnes v. Gorman*, 536 U.S. 181, 185-89 (2002) (holding that because punitive damages are not available in private actions for discrimination under Title VI, they are similarly unavailable under the ADA or the Rehabilitation Act).

conduct violated the law is therefore a dispositive, purely legal question that can and should be decided by a court on motion before necessitating discovery of GEICO's privileged communications with its attorneys. This Court should address that question and hold that GEICO's motion for summary judgment was properly granted by the district court. As the district court already recognized, GEICO's interpretation of FCRA's adverse-action notice requirements was far from groundless, and this Court's ruling on that issue will provide needed guidance to the lower courts.

1. As the Government correctly notes, reckless disregard of the law "bespeaks an aggravated or extreme departure from standards of ordinary care," which necessitates proof of an "unjustifiably high risk" or "high degree" of probability that the defendant's conduct is unlawful. U.S. Br. 21. The probability that the defendant's conduct is unlawful must be "*substantially* greater than that which is necessary to make [the defendant's] conduct negligent." Restatement (Second) of Torts § 500 (1965) (emphasis added); *see also id.* at cmt. g (stating that the difference between negligence and recklessness "is a difference in the degree of the risk ... so marked as to amount substantially to a difference in kind"); *McLaughlin v. Richland Shoe*, 486 U.S. 128, 134-35 & n.13 (1988). That is, recklessness denotes a risk of unlawfulness that is quantitatively and qualitatively greater than a merely unreasonable risk.

Recognizing this distinction, the Court has explained that an act taken in reckless disregard of the law refers to "a thing done *without ground* for believing it is lawful." *United States v. Murdock*, 290 U.S. 389, 394 (1933) (emphasis added). Consequently, "the extent to which the law was well-established and clearly understood must be part of the analysis." U.S. Br. 22; *see Screws v. United States*, 325 U.S. 91, 103 (1945) (interpreting "willfully" to require an objective inquiry into whether defendant acted in reckless disregard to a "right made definite" by the law); *Kolstad v.*

ADA, 527 U.S. 526, 536-37 (1999) (recognizing that a reckless-disregard finding would be improper where the underlying theory of discrimination was novel or otherwise poorly recognized).

Edo alludes to two different forms of recklessness. Resp. Br. 44-46. The first, referred to as "[c]ivil-law recklessness," bespeaks a "fail[ure] to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Farmer*, 511 U.S. at 836. The second, termed "[c]riminal recklessness," requires a higher showing that the defendant *was in fact* aware of the unjustifiably high risk. *Id.* at 836-37. Though the latter standard originally developed in the criminal law, this Court held in *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, 107 (1893), that it was "well settled" that claims for punitive damages under the common law required poof of "criminal indifference to civil obligations," and this Court has subsequently used that standard in statutes authorizing punitive damages. *See, e.g., Kolstad*, 527 U.S. at 535 (Title VII); *Smith v. Wade*, 461 U.S. 30, 50 (1983) (§ 1983); *see also, Farmer*, 511 U.S. at 839 (*Bivens* action); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation). Contrary to Edo's (and the Ninth Circuit's) understanding, these precedents unequivocally would require application of that "criminal recklessness" standard here. Indeed, criminal recklessness was adopted by this Court in the *Thurston/Richland Shoe* line of cases.[15]

Edo complains that the absence of an objectively

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[15] *See TransWorld Airlines v. Thurston*, 469 U.S. 111, 129-30 (1985) (focusing on what the defendant "knew" or might have "overlooked"). Likewise, *Kolstad* explained that an employer does not act in reckless disregard when it "discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability." 527 U.S. at 536-37 (citing *Hazen Paper*). Circuit courts have interpreted this to denote the criminal recklessness standard. *See, e.g., Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 777 (7th Cir. 2001).

excessive risk that GEICO's conduct was unlawful should not render GEICO's subjective apprehension of the risk irrelevant. Resp. Br. 46. But that consequence follows necessarily from the definition of recklessness, in both its "civil" and "criminal" forms. A determination that a defendant's conduct was *not* excessively risky necessarily obviates any subjective inquiry into whether the defendant "knew" (or should have known) its conduct posed an excessive risk. *See Prof'l Real Estate Investors v. Col. Pictures Indus.*, 508 U.S. 49, 65-66 (1993) (granting summary judgment without considering defendant's subjective motivations, "which were rendered irrelevant by the objective legal reasonableness" of its legal position).[16]

Edo also protests that the objective risk posed by a defendant's conduct should be gauged by the fact-finder. Resp. Br. 50. The courts' treatment of reckless disregard will naturally vary with context, depending, for example, on whether a defendant is said to have recklessly disregarded the truth, *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657 (1989), the welfare of another, *Farmer*, 511 U.S. at 837, or the law, *Kolstad*, 527 U.S. at 535. Here, where the issue is reckless disregard of the *law*, and the facts are not in dispute, the determination whether the defendant's conduct posed an excessive risk of unlawfulness is paradigmatically a legal question for the court.

As the Government urges (Br. 23), moreover, this inquiry should be undertaken "at an early stage of the case" because it involves a "purely legal" determination that can streamline the litigation. That approach also serves to ensure that defendants will need to waive the attorney-client privilege only when actually necessary to resolve the issue of recklessness. *See Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) (considering potential interference with attorney-client privilege in rejecting proposed consultation

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[16] Concomitantly, a defendant's subjective "belief" cannot trigger liability where the law is sufficiently ambiguous to be objectively "unknowable." *Screws v. United States*, 325 U.S. 91, 105 (1945).

exception to the Fifth Amendment).[17] *See* GEICO Br. 11 (explaining it must produce all privileged communications on remand absent relief in this Court).

2. The Government acknowledges that, even if GEICO's interpretation of the notice requirement was erroneous, it "did not reflect such an extreme departure from the range of responsible judgment as to be either tantamount to a knowing violation of the law or to reflect such heedless disregard of its duty to comply with the law." U.S. Br. 29-30. That conclusion is correct for several reasons. *First*, and foremost, the statutory text is not without ambiguity, as the Government and even Edo have admitted.[18]

Second, GEICO did not have the benefit of any authoritative guidance from any court or agency. As the Ninth Circuit noted, the interpretations of §§ 1681a(k)(1)(B)(i) and 1681m were questions of first impression before the district court. Pet. App. 15a.[19] And despite Edo's protestations to the contrary (*see, e.g.*, Resp. Br. 7-8, 50, 58-60), the Government acknowledges that the FTC has never issued authoritative guidance on the interpretation of the relevant provisions of FCRA.[20] U.S.

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[17] Edo's attempts to distinguish the immunity cases cited by GEICO miss the point. Regardless of the reason for inquiring into the obviousness of the alleged violation (in those cases, a desire not to chill official action or first amendment speech, here the "excessive risk" element of recklessness), the clarity of the law is a determination for the court that is most appropriately made at the earliest possible stage.

[18] U.S. Br. 29; Pls.' Mem. Resp. to Defs.' Renewed Mot. for Sum. J., district court docket 112.

[19] Edo and his amici contend that *Mick v. Level Propane Gases, Inc.*, 203 F.R.D. 324 (S.D. Ohio 2001), and *Scharpf v. AIG Marketing, Inc.*, 242 F. Supp. 2d 455 (W.D. Ky. 2003), should have provided notice to GEICO that its conduct was unlawful. But *Mick* expressly declined to decide whether charging a customer more than the best possible rate constitutes adverse action, and *Scharpf* articulated the dictum on which Edo relies *after* GEICO discontinued the policy at issue here.

[20] The so-called Ball Letter relied upon by Edo is an informal FTC staff opinion that, by its own terms, was "not binding on the Commission." Letter from Hannah A. Stires to James M. Ball (Mar. 1, 2000), *available at* http://www.ftc.gov/os/statutes/fcra/ball.htm. Edo also cites the FTC's

Br. 29. Nor could it, since it lacks legislative rule-making authority with respect to these provisions.[21] Edo's claim that GEICO was willful in not seeking further guidance from the FTC, Resp. Br. 49, is absurd since the FTC's response would not even have been binding on the agency.

Third, GEICO's view of adverse action comports with the State of Nebraska's interpretation of its Model Act Regarding Use of Credit Information in Personal Insurance, which contains a virtually identical definition of "adverse action." *See* Neb. Rev. Stat. § 44-7704(1).[22] Like GEICO, Nebraska reads the text to require notice "only if the insured experiences an increase in the rate over the rate that would have been charged with a neutral credit score."[23]

Finally, the district court *agreed* with GEICO's position, finding it "well-reasoned and thoughtful." Pet. App. 38a n.1.

3.a. Fearful of this Court's legal judgment, Edo belatedly attempts to manufacture disputed issues of fact where there are none. Edo has lodged with the Court later-discovered documents, which he says suggest that GEICO "knew" that the Ninth's Circuit's reading was the correct interpretation of FCRA's notice requirement. This foray into non-record material violates one of the most fundamental tenets of appellate practice.[24] But even if these

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"Notice to Users of Consumer Reports" for the proposition that "adverse action" is defined "broadly." 16 C.F.R pt. 601, app. C. Nothing in the notice, however, suggests the Ninth's Circuit's "best possible" score baseline.

[21] The Commission has authority to promulgate rules and regulations only in discrete and specific circumstances not applicable here. *See, e.g.*, 15 U.S.C. § 1681a(q) (allowing the Commission to define "identity theft" and "identity theft report"). In contrast, Congress gave *other* agencies broad authority to promulgate rules and regulations. *See id.* § 1681s(e).

[22] Nebraska's definition of "adverse action" differs from FCRA only by its inclusion of the word "personal" in the phrase "in connection with the underwriting of *personal* insurance." (emphasis added).

[23] *See* Letter from Eric Dunning, Neb. Dep't of Ins., to James A. Pugh (Mar. 8, 2006). GEICO has sought leave to lodge this document with the Court under Supreme Court Rule 32.3.

[24] *See* Robert L. Stern et al., *Supreme Court Practice* 650 (8th ed. 2002) (arguments based on non-record materials have been consistently condemned by the Court); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503,

materials were properly before the Court, they do not advance Edo's argument. The cited Status Report contains nothing more than the early, informal, inconclusive, "brainstorm[]" musings of non-lawyers about possible ways to satisfy the adverse-action notice requirement. It sheds no light on GEICO's beliefs regarding the policy it ultimately adopted and applied to Edo. And, most importantly for present purposes, it is completely irrelevant to this Court's determination whether the lawfulness of that policy was sufficiently colorable to obviate any need to proceed with a subjective inquiry. Edo's inappropriate attempt to ensnare this Court in irrelevant factual issues simply highlights the importance of employing an objective threshold test.

Edo's other attempts to manufacture a factual controversy by mischaracterizing deposition testimony[25] and GEICO's statements to regulators[26] equally have no bearing on the objective merits of GEICO's interpretation of the law. And his newly-voiced doubts about GEICO's use of a neutral credit weight (Resp. Br. 10-12) are irrelevant, as Edo unequivocally conceded and the lower courts found that GEICO's methodology compared the premium he was actually offered with the premium he would have been

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518 n.22 (1981) (declining to consider facts outside the record).

[25] Edo mischaracterizes the testimony of Paul Lavrey, who simply agreed that if Edo's "placement was based on the highest credit weight," then, *under the procedure employed in 2003*, GEICO would have issued an adverse action notice. SER 509-10 (Lavrey Dep. at 141:1-21, 142:1-10). This testimony is completely immaterial to GEICO's policy at the time of Edo's application.

[26] Edo spuriously claims that GEICO misled the Oregon Insurance Division by stating that "all applicants get written disclosure if an adverse action ... is made based on a credit report." Resp. Br. 13. But GEICO's representation was entirely consistent with its interpretation of what it means to take adverse action "based ... on" a credit report. Edo also challenges GEICO's statement that there are no situations in which treatment differs from the "treatment offered to [those with the] best credit scores." *Id.* The accuracy of that statement is completely irrelevant to the merits of this case, but in any event GEICO expressly informed Oregon regulators that applicants with good credit are treated more favorably. *See* ER 158.

offered "had [GEICO] not considered his credit information." JA 31; *see also* Pet. App. 46a; *id.* at 21a.[27]

b. Contrary to Edo's argument, whether GEICO's interpretation of FCRA was sufficiently reasonable to refute the charge of willfulness as a matter of law was a "subsidiary question fairly included" within the questions presented, S. Ct. Rule 14(a), particularly when the questions GEICO presented are read in light of the text of its petition for certiorari. *See Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978) ("[O]ur power to decide is not limited by the precise terms of the question presented.").

The first of GEICO's questions presented asked whether the Ninth Circuit's standard "impermissibly permits a finding of willfulness to be based ... upon conduct that is objectively reasonable as matter of law," and the certiorari petition argued that "GEICO's actions were objectively reasonable as a matter of law, precluding any finding of willfulness." GEICO Pet. 24. GEICO's basis for challenging the Ninth Circuit's ruling was thus expressly grounded in part on that court's failure to appreciate the objective reasonableness of GEICO's conduct. *Kolstad*, 527 U.S. at

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[27] GEICO's methodology is in any event straight-forward. As previously explained, GEICO uses credit scores and other information to predict the ratio between losses and premiums (the "loss ratio"), which underlies its company and tier-placement decisions. To that end, consumers' attributes are weighted based on their predictive correlation with loss. So, for example, a higher (better) credit score will receive a higher weight. *See generally* JA 63-68. When, as here, GEICO wants to determine how it would have treated a consumer without considering her credit report (or in circumstances where GEICO cannot locate the credit report or the consumer refuses to disclose it), GEICO simply substitutes for the weight associated with the consumer's actual credit score a "neutral" weight that corresponds to an average loss ratio, which effectively takes risks associated with credit out of the equation. *See* JA 45-46. Use of a neutral factor in circumstances where credit is unavailable has been approved by 26 states, GEICO Br. 5 & n.5, and is endorsed by the National Association of Insurance Commissioners. Nicole Harner Williams, *The Use of Credit Scoring in Insurance Underwriting*, Insurance and Financial Services Report 10 (Fall 2004). As the Ninth Circuit observed, an average credit score will correspond generally to a neutral credit weight. Pet. App. 13a.

540 (an issue "integral to the resolution of the case" can be treated as "fairly subsumed" by the questions presented). Edo cannot complain of any lack of notice here. *See Missouri v. Jenkins*, 515 U.S. 70, 86 (1995) ("[T]here is no unfairness or imprudence in deciding issues that have been passed upon below, are properly before us, and have been briefed by the parties.").

Nor are there prudential reasons to refrain from applying FCRA's "willful" standard to GEICO's conduct. The question of GEICO's objective reasonableness is based on undisputed facts, has been fully briefed, and is a pure question of law. In similar circumstances, this Court has not hesitated to apply a statute in the course of explaining what the statute means. *See, e.g., Thurston*, 469 U.S. at 128-30 (applying reckless disregard standard). There are powerful reasons to do so here. The briefs for both sides are replete with examples of courts and practitioners struggling in various contexts to apply this Court's teachings on the meanings of "willfulness," "reckless disregard," and other abstract scienter requirements. In considering the second question presented in this case, the Court unavoidably will come to a conclusion about the objective merits of GEICO's interpretation of FCRA's adverse-action notice requirement. Should it disagree with GEICO's statutory interpretation, the Court would provide lower courts and practitioners substantial guidance by applying the willfulness standard that it adopts to the concrete circumstances of this case. *Cf. Strickland v. Washington*, 466 U.S. 668, 698 (1984) ("Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles.").

CONCLUSION

For the reasons set forth, this Court should reverse the judgment of the Court of Appeals and dismiss Edo's claim against GEICO.

Respectfully submitted,

Maureen E. Mahoney
Counsel of Record
Richard P. Bress
Eric S. Volkman
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Robert D. Allen
Meloney Cargil Perry
Jay F. Utley
Brandon P. Long
Baker & McKenzie LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 978-3000

Counsel for Petitioners GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company

ADDENDUM

STATUTORY ADDENDUM[1]

15 U.S.C. § 1681a. Definitions; rules of construction

* * *

(m) Credit or insurance transaction that is not initiated by the consumer. The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of-

(1) reviewing the account or insurance policy; or
(2) collecting the account.

* * *

15 U.S.C. § 1681h(e). Conditions and form of disclosure to consumers

* * *

(e) Limitation of liability. Except as provided in sections 616 and 617 [15 USCS §§ 1681n and 1681o], no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615 [15 USCS § 1681g, 1681h, or 1681m], or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report[,] except as to

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[1] Additional statutory provisions replied upon by GEICO are set forth in the appendix to the Government's brief.

false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. § 1691 (Equal Credit Opportunity Act). Scope of prohibition

* * *

(d) Reason for adverse action; procedure applicable; "adverse action" defined.

* * *

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

* * *

12 C.F.R. § 202.2. Definitions

* * *

(c) Adverse action-(1) The term means:

(i) A refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered;

(ii) A termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts; or

(iii) A refusal to increase the amount of credit available to an applicant who has made an application for an increase.

(2) The term does not include:

(i) A change in the terms of an account expressly agreed to by an applicant.

(ii) Any action or forbearance relating to an account taken in connection with inactivity, default, or delinquency as to that account;

(iii) A refusal or failure to authorize an account transaction at point of sale or loan, except when the refusal is a termination or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts, or when the refusal is a denial of an application for an increase in the amount of credit available under the account;

(iv) A refusal to extend credit because applicable law prohibits the creditor from extending the credit requested; or

(v) A refusal to extend credit because the creditor does not offer the type of credit or credit plan requested.

(3) An action that falls within the definition of both paragraphs (c)(1) and (c)(2) of this section is governed by paragraph (c)(2) of this section.

* * *

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Nos. 06-84 and 06-100

In the Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL., PETITIONERS

v.

CHARLES BURR, ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL., PETITIONERS

v.

AJENE EDO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR IN NO. 06-84 AND REVERSAL IN NO. 06-100

PAUL D. CLEMENT
Solicitor General
Counsel of Record

THOMAS G. HUNGAR
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DEMILLE-WAGMAN
Attorney
Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, imposes civil liability on "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer," 15 U.S.C. 1681n(a). The Act further requires a person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" to provide the consumer with notice of the action. 15 U.S.C. 1681m(a). The questions presented are:

1. Whether the phrase "willfully fails to comply" with the FCRA's requirements encompasses not only knowing violations of the Act, but also reckless disregard of the law's obligations and, if so, whether the court of appeals erred in articulating and applying the reckless-disregard standard.

2. Whether charging an insurance customer a higher rate based, in whole or in part, on his credit report constitutes an "adverse action," notwithstanding the fact that the insured would have received the same rate even if no consumer report had been consulted.

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INTEREST OF THE UNITED STATES

This case concerns the proper construction of the adverse-action and civil-liability provisions of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* Congress charged the Federal Trade Commission (Commission) with primary responsibility for civil enforcement of the FCRA, while vesting federal banking and other agencies with complementary authority over the Act's application in certain specialized contexts. See 15 U.S.C. 1681m(h)(8)(B) (Supp. IV 2004); 15 U.S.C. 1681s(a)-(b) (2000 & Supp. IV 2004). The Commission has also issued formal guidance on the FCRA's construction and implementation, see 16 C.F.R. Pt. 600 App. The United States accordingly has a vital interest in ensuring the proper interpretation and application of the FCRA's provisions, and participated as amicus curiae in this Court's prior FCRA case. See *TRW Inc.* v. *Andrews*, 534 U.S. 19 (2001).

STATEMENT

1. a. Congress enacted the FCRA in 1970 to prevent harm to consumers arising from flaws in the credit reporting system, to protect consumer privacy, and to improve the integrity and reliability of credit reports, thereby promoting efficiency in the Nation's banking and consumer credit systems. *TRW*, 534 U.S. at 23; S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969). Congress found that "[a]n elaborate mechanism has been developed" for investigating, cataloguing, and disseminating information about the "credit standing, credit capacity, character, and general reputation" of tens of millions of consumers. 15 U.S.C. 1681(a)(2). Congress passed the FCRA "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartial-

ity, and a respect for the consumer's right to privacy." 15 U.S.C. 1681(a)(4). Improving the "[a]ccuracy and fairness of credit reporting," 15 U.S.C. 1681(a), was critical because "[i]naccurate credit reports directly impair the efficiency of the banking system" and erode "the public confidence which is essential to the continued functioning of the banking system," 15 U.S.C. 1681(a)(1). Congress thus directed consumer reporting agencies "[to] adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information" in a manner that is "fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. 1681(b).

The FCRA identifies the purposes for which consumer reports may permissibly be requested and used, including the underwriting of insurance. 15 U.S.C. 1681b(a)(3)(A)-(C) (Supp. IV 2004). The Act also gives consumers the right to see their credit report, 15 U.S.C. 1681g (2000 & Supp. IV 2004), and establishes detailed procedures for the resolution of consumers' disputes over the accuracy of reports, 15 U.S.C. 1681i (2000 & Supp. IV 2004). The Act further requires all users of credit reports to provide notice to the affected consumer whenever they "take[] any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," and to inform the consumer of the right to obtain a copy of the report and to challenge its content. 15 U.S.C. 1681m(a).

b. Congress created a federal cause of action for consumers against those who furnish credit information, or who create, market, or use credit reports in violation of

the FCRA. 15 U.S.C. 1681p (Supp. IV 2004).[1] Under 15 U.S.C. 1681*o* (2000 & Supp. IV 2004), "[a]ny person who is negligent in failing to comply with any requirement imposed under [the FCRA] with respect to any consumer" is liable for "actual damages sustained by the consumer as a result of the failure," as well as costs and attorney's fees. 15 U.S.C. 1681*o*(a) (2000 & Supp. IV 2004). If the failure to comply with a requirement of FCRA is "willful[]," the consumer may obtain (i) either actual damages or statutory damages "of not less than $100 and not more than $1,000," (ii) "such amount of punitive damages as the court may allow," and (iii) costs and attorney's fees. 15 U.S.C. 1681n(a)(1)(A)-(3).[2]

2. This case arises out of two separate proposed class actions against two different insurance companies for allegedly failing to comply with the FCRA's adverse-action notice requirements.

a. Respondent Edo applied to GEICO for automobile insurance.[3] GEICO relied on Edo's credit report to eval-

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[1] In 2003, Congress limited private enforcement of violations of Section 1681m. See 15 U.S.C. 1681m(h)(8) (Supp. IV 2004).

[2] Congress also established civil liability for specific instances of "knowing noncompliance," rendering any person "who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose" liable to the consumer reporting agency for either actual damages or $1000 in statutory damages, "whichever is greater." 15 U.S.C. 1681n(b). Congress further directed that a "natural person" who obtains a consumer report from any source "under false pretenses or knowingly without a permissible purpose" is likewise liable for the greater of either actual damages or $1000. 15 U.S.C. 1681n(a)(1)(B).

[3] While the parties disputed below which (if any) of the GEICO and Safeco companies were proper defendants, petitioners do not press that argument here. Accordingly, this brief refers to the petitioners in No. 06-100 as "GEICO" and in No. 06-84 as "Safeco."

uate his application and, based in part on the report, offered Edo insurance at a higher premium rate than it offered to other applicants. 06-100 Pet. App. 39a.

Originally, GEICO provided adverse action notices to all customers whose initial insurance rates were based, at least in part, on adverse credit reports. 06-100 Pet. App. 12a. GEICO subsequently changed that policy and, instead, compared the rate an insured was offered to the rate he would have been offered if the credit report had been "neutral." *Ibid.* Where GEICO determined, as it did in Edo's case, that the rate would not have changed if it had applied a neutral credit score (or if it had not considered his credit score at all), GEICO did not issue an adverse action notice. *Id.* at 14a, 21a n.12. In 2002, GEICO abandoned that policy and resumed issuing adverse action notices "whenever a report with more favorable credit information would have resulted in a lower insurance rate." *Ibid.*

Edo filed a proposed class-action lawsuit against GEICO alleging that GEICO violated the FCRA by failing to provide him with an adverse action notice. The complaint sought statutory and punitive damages. 06-100 Pet. App. 9a. The district court granted GEICO's motion for summary judgment, *id.* at 37a-47a, holding that no adverse action occurred because Edo's insurance rate "would have been the same even if GEICO Indemnity did not consider information in [Edo's] consumer credit history." *Id.* at 46a.

b. Respondents Charles Burr and Shannon Massey purchased insurance policies from Safeco. Safeco relied on information in their consumer reports to set the initial premiums and, based on that information, charged them higher rates than it charged customers with better re-

ports. Safeco, however, did not issue Burr or Massey adverse action notices. 06-84 Pet. App. 4a-5a, 11a.

Burr and Massey subsequently joined as named plaintiffs in a proposed class-action lawsuit alleging that Safeco's failure to provide adverse action notices after setting higher insurance premiums based on their credit reports constituted a willful violation of the FCRA. 06-84 Pet. App. 24a. While they did not allege actual damages, Burr and Massey sought statutory and punitive damages. 06-84 Pet. C.A. Supp. E.R. 3-4.

The district court granted Safeco's motion for summary judgment against Burr and Massey. 06-84 Pet. App. 3a-14a. The court held that the use of a credit report to set higher premiums for an initial application for insurance was not an "adverse action" because the FCRA requires an "increase in any charge for" insurance, 15 U.S.C. 1681a(k)(1)(B)(i), and such an increase could occur only if the "insurer charges an insured one price for insurance and then subsequently increases that charge." 06-84 Pet. App. 11a-12a.

3. The court of appeals reversed in both cases. 06-84 Pet. App. 1a-2a; 06-100 Pet. App. 1a-36a.

a. In respondent Edo's case, the court held that GEICO's use of his credit report to set his insurance rate constituted an "adverse action" under the FCRA, because the company relied on the report and, if Edo's credit rating had been better, he would have been charged a lower rate. 06-100 Pet. App. 20a-21a.

Addressing the standard for a willful violation of the FCRA, the Ninth Circuit agreed with the Third Circuit that a defendant acts "willfully" if it acts with either a conscious disregard of consumers' known rights under the FCRA or "reckless disregard of whether the policy [or action] contravened those rights." 06-100 Pet. App.

31a (quoting *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997)). The court further held that, under the reckless-disregard standard, a defendant will be liable if it relies "on creative lawyering that provides indefensible answers," "implausible interpretations," or "creative but unlikely answers to 'issues of first impression.'" *Id.* at 33a-34a. The court concluded that "at least some of the interpretations" in the case were "implausible," *id.* at 34a, and remanded to the district court for further proceedings. *Id.* at 36a.

b. In petitioner Safeco's case, the court of appeals reversed. 06-84 Pet. App. 1a-2a. Based on its decision in *Edo*, the court held that the FCRA's adverse action provision applies to increases in the charge for an initial policy of insurance, *id.* at 1a-2a, and that Safeco could be held to have acted willfully, *id.* at 2a.

SUMMARY OF ARGUMENT

I. Under the FCRA, a person willfully fails to comply with the law if he or she acts knowingly or in reckless disregard of the Act's requirements. For decades, this Court has repeatedly held that the term "willfully" in civil statutes encompasses not only knowing, but also reckless, disregard of the law or the rights of others. That familiar pattern includes statutes that were enacted contemporaneously with the FCRA and that share its focus on compliance with laws protecting federally created rights. In the absence of a contrary indication in the text—and there is none in the FCRA—this Court's settled practice is to assume that Congress hewed to that pattern, rather than departed anomalously from it. That ordinary reading of "willfully" also comports with the FCRA's structure, which separately carves out for more serious treatment certain violations committed "know-

ingly," a limitation that would be meaningless if "willfully" were already confined to violations of known legal standards.

While the court of appeals was correct to construe "willfully" as incorporating a reckless-disregard component, the court misdescribed and misapplied that standard. To establish reckless disregard in failing to comply with the law, a plaintiff must show more than an unreasonable, unlikely, or implausible construction of the law. The plaintiff must establish that the defendant acted either in disregard of known legal obligations or with indifference to an objectively high and obvious risk of unlawfulness. Reckless disregard, in other words, requires such an extreme departure from standards of ordinary care as either to be tantamount to acting knowingly or to reflect such disregard for the law as to merit equivalent censure.

II. The court of appeals correctly held that charging a customer a higher rate for insurance based on his credit report constitutes an adverse action. The FCRA defines "adverse action" to include "an increase in any charge for [insurance] * * * applied for" based on the content of a credit report. 15 U.S.C. 1681a(k)(1)(B)(i). That language readily encompasses charging an individual a higher rate than that given to customers with better credit reports, just as charging a higher premium based on a new applicant's other individual characteristics, such as age, gender, or a poor driving record, would naturally be described as an "increase" in the rate charged.

GEICO argues that no adverse action occurred because Edo would have received the same insurance rate if his credit report had not been used. But that is irrelevant. Edo's credit report was used, and GEICO charged

Edo a higher rate as a result. The rate he would have been charged if, contrary to fact, his report has not been consulted is beside the point. Insurers are not required to use credit reports, but when they choose to do so they must comply with Congress's calibrated scheme, which seeks to protect both consumers and the integrity and reliability of the Nation's credit and banking systems, and which makes providing consumers with notice of all adverse actions critical to accomplishing those goals.

While GEICO's construction of the adverse-action notice requirement was erroneous, the resulting failures to notify consumers were not willful violations of the FCRA. The legal question of the FCRA's coverage was one of first impression that was not settled by statutory text, formal agency guidance, or case law. GEICO's reading, while wrong, does not reflect the type of extreme departure from responsible judgment that amounts to reckless disregard of the law.

ARGUMENT

I. A "WILLFUL" FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE FCRA REQUIRES PROOF THAT THE DEFENDANT EITHER KNOWINGLY OR RECKLESSLY DISREGARDED THE LAW

"[W]illfully" is "a word of many meanings," the construction of which "is often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998) (quoting *Spies* v. *United States*, 317 U.S. 492, 497 (1943)).[4] When the word appears in criminal statutes, it generally refers to a "culpable state of mind,"

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[4] See *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *United States* v. *Bishop*, 412 U.S. 346, 352 (1973); *Screws* v. *United States*, 325 U.S. 91, 101 (1945).

such as a "bad purpose" to violate the law, *Bryan*, 524 U.S. at 191 & n.12. By contrast, when (as here) "willfully" appears in a civil statute—particularly one that is designed to protect federal rights and that is framed in terms of the defendant's compliance with the law—the term means a knowing or reckless disregard of the law. "Recklessness," in turn, requires more than mere negligence. *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988). It imposes an objective standard that is satisfied only if the defendant acted in the face of such a high risk that its conduct would violate the law that the illegality was either known or so obvious as to require the exercise of greater care.

A. "Willfully" Is Traditionally Interpreted In Civil Statutes, Particularly Laws Designed To Enforce Federal Rights, To Mean Either Knowing Or Reckless Disregard Of Legal Obligations

Construing the word "willfully" in the FCRA to encompass both knowing and reckless disregard of the law "is surely a fair reading of the plain language of the Act." *Richland Shoe*, 486 U.S. at 133. More than a half-century ago, in *United States* v. *Illinois Central R.R.*, 303 U.S. 239 (1938), the Court approved the following "useful guide to the meaning of the word 'willfully'" in the civil context: "it means purposely or obstinately and is designed to describe the attitude of a [defendant], who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to [the statute's] requirements," *id.* at 243.

More recently, in *TWA, Inc.* v. *Thurston*, 469 U.S. 111 (1985), this Court held that liquidated damages for "willful violations" of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 601 *et seq.*, required proof

that the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Thurston*, 469 U.S. at 125-126; see *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 617 (1993) (same). The Court reached the same conclusion under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* See *Richland Shoe*, 486 U.S. at 133.[5]

That generally established understanding of "willfully" in the civil context forms the backdrop against which Congress enacted the FCRA's willful liability provision, and thus the "absence of [any] contrary direction" in the statute evidences Congress's "satisfaction with [that] widely accepted definition[], not * * * a departure from [it]." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). That common-sense assumption has particular salience here, for two reasons.

First, when Congress's aim is to enforce federal rights and to induce regulated entities' attention and adherence to the obligations of federal law, Congress has a long tradition of employing the reckless-disregard standard to accomplish that end. In the FCRA, just like the FLSA and the ADEA, the object to which the willfulness standard refers is a defendant's failure to comply with the particular legal constraints imposed by the Act itself. Compare 15 U.S.C. 1681n(a), with 29 U.S.C. 255(a); 29

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[5] GEICO notes (06-100 Pet. 15) that *Richland Shoe* involved only a statute-of-limitations provision. There is no reason why that distinction should matter, however. Indeed, it was the established construction of the FLSA's criminal willfulness provision that provided the predicate for the Court's adoption of that recklessness standard. See *Richland Shoe*, 486 U.S. at 133; *Thurston*, 469 U.S. at 125-127. Moreover, the FLSA's civil penalty provision, 29 U.S.C. 216(e), accords "willfully" the same established meaning. See *Baystate Alternative Staffing, Inc.* v. *Herman*, 163 F.3d 668, 679-680 & n.14 (1st Cir. 1998).

U.S.C. 626(b).[6] It was in that context that this Court concluded in *Thurston* and *Richland Shoe* that willfulness encompasses a defendant's reckless disregard of the law. That same recklessness standard governs liability provisions in other federal laws, like (i) the Family and Medical Leave Act, 29 U.S.C. 2617(c)(2) (statute of limitations)[7]; (ii) the Occupational Safety and Health Act, 29 U.S.C. 666(a) (civil penalties)[8]; (iii) the Copyright Act, 17 U.S.C. 504(c)(2)[9]; and (iv) firearms licensing, 18 U.S.C. 923(e) (Supp. IV 2004).[10]

Congress similarly employed a standard of reckless disregard or reckless indifference to federal rights to enforce, through punitive damages, compliance with Title VII, 42 U.S.C. 2000e *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* See 42 U.S.C. 1981a(b)(1); *Kolstad* v. *American Dental Ass'n*, 527 U.S.

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[6] That stands in distinction to willfulness standards that focus on conduct external to the statute. See, *e.g.*, Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, art. 25(1), 49 Stat. 3020, 137 L.N.T.S. 27 ("willful misconduct"); 11 U.S.C. 523(a)(6) ("willful and malicious injury"); 38 U.S.C. 1110 ("willful misconduct").

[7] See *Porter* v. *New York Univ. Sch. of Law*, 392 F.3d 530, 531-532 (2d Cir. 2004); *Hanger* v. *Lake County*, 390 F.3d 579, 583-584 (8th Cir. 2004); *Hillstrom* v. *Best Western Hotel*, 354 F.3d 27, 33 (1st Cir. 2003).

[8] See, *e.g.*, *A.J. McNulty & Co.* v. *Secretary of Labor*, 283 F.3d 328, 337 (D.C. Cir. 2002); *Brock* v. *Morello Bros. Constr., Inc.*, 809 F.2d 161, 164 (1st Cir. 1987) (Breyer, J.).

[9] See, *e.g.*, *Island Software & Computer Serv., Inc.* v. *Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005) (willfulness requires actual knowledge or "reckless disregard," or "willful blindness"); *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003), cert. denied, 540 U.S. 1107 (2004).

[10] See *RSM, Inc.* v. *Herbert*, No. 06-1393, 2006 WL 3026344, at *5 (4th Cir. Oct. 26, 2006) ("deliberate disregard" or "plain indifference").

526, 535-538 (1999). That same standard has been employed to enforce constitutional and civil rights generally under 42 U.S.C. 1983. See *Smith* v. *Wade*, 461 U.S. 30, 51 (1983) ("adopt[ing]" for Section 1983 "the policy judgment of the common law—that reckless or callous disregard for the plaintiff's rights * * * should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages").

Second, the FCRA was enacted in 1970, contemporaneously with other statutes in which "willfully" has been held to encompass reckless disregard. The ADEA was enacted in 1967, see Pub. L. No. 90-202, 81 Stat. 602, while the FLSA provision at issue in *Richland Shoe* was enacted in 1966, Pub. L. No. 89-601, § 601(b), 80 Stat. 844. There is no sound basis for holding that the meaning of "willfully" in civil statutes deviated dramatically before 1970. See *Dixon* v. *United States*, 126 S. Ct. 2437, 2445 (2006) (courts must construe a statutory term in a liability provision "as Congress may have contemplated it" at the time of enactment).

Accordingly, giving "willfully" in the FCRA's civil liability provision the same established meaning that the term signifies in substantively analogous and contemporaneously enacted statutes would be consistent with Congress's general practice of employing a "reckless disregard" standard to enforce compliance with federal law and to induce solicitude for federally created rights.[11]

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[11] Safeco argues (Pet. 20) that *Thurston* and *Richland Shoe* are distinguishable because the "willful" provisions in the ADEA and the FLSA were enacted "against the backdrop of consistent circuit precedent interpreting the term 'willful' to include 'reckless disregard.'" But that circuit precedent merely reflected this Court's repeated decisions construing "willful" to include a reckless-disregard component. See *Thurston*, 469 U.S. at 126 ("The definition of 'willful'

B. The Structure Of The Fair Credit Reporting Act Demonstrates That "Willfully" Includes Both Knowing And Reckless Disregard Of The Law

Petitioners' argument (06-84 Pet. 28; 06-100 Pet. 21-24) that willfulness requires actual knowledge of the violation of federal law not only overlooks established usage of the term in civil statutes, but also fails to comport with the overall structure and design of the FCRA.

First, when Congress wanted to restrict liability to knowing violations of the FCRA, it said so explicitly. Section 1681n(a)(1)(B) explicitly identifies and targets for separate treatment a specialized subset of violators within the general category of willful violations of the FCRA: those defendants who violate 15 U.S.C. 1681b(f) by obtaining a credit report either "under false pretenses" or "knowingly without a permissible purpose." 15 U.S.C. 1681n(a)(1)(B). If the word "willfully" in the overarching civil-liability subsection (15 U.S.C. 1681n(a)) already restricted the scope of that provision to "knowing" violations of the law, there would have been no reason for Congress to repeat that "knowingly" limitation in subparagraph (1)(B). This Court does not generally construe statutory terms in a manner that leaves them "with no job to do." *Doe* v. *Chao*, 540 U.S. 614, 623 (2004). Congress also increased the minimum statutory damages for such violators to no less than $1000, 15 U.S.C.

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adopted by the above cited courts [of appeals] is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes."); see also *id.* at 126-127. Indeed, that meaning was so well settled that the *Richland Shoe* Court *rejected* a contrary standard that had, in fact, been "widely used for a number of years" by courts of appeals, 486 U.S. at 133, because that reading was contrary to the "plain language of the statute," which dictated a knowing or reckless-disregard standard, *id.* at 134.

1681n(a)(1)(B), which underscores that Congress considered the conduct more culpable than the "willful" violations covered by the rest of the provision—such as obtaining a report with reckless disregard of the impermissibility of the purpose, which would render the person liable under Section 1681n(a)(1)(A) for a willful violation of Section 1681b(f).

Likewise, in Section 1681n(b), Congress created a cause of action for consumer reporting agencies (as opposed to consumers) that is limited to actions taken under false pretenses or "knowingly without a permissible purpose." 15 U.S.C. 1681n(b). Congress subtitled that provision "Civil liability for knowing noncompliance," in contrast to Section 1681n's general caption of "Civil liability for willful noncompliance." If willfulness were already limited to knowing violations, there would have been no reason for Congress to separate out structurally those violations that require a knowing violation of the FCRA. See also 15 U.S.C. 1681s(a)(2)(A) (civil liability actions by the Commission require a "knowing violation" of the FCRA). The plain import of Congress's language and structure thus confirms what the ordinary understanding of the text says—liability for "willful" violations reaches further than just knowing violations of the law and includes conduct in reckless disregard of the FCRA's requirements.

Second, Congress's deliberate use of different *mens rea* phraseology in the FCRA's criminal prohibitions underscores Congress's sensitivity to the distinct usages of "willfully" in civil and criminal law. In 15 U.S.C. 1681q and 1681r respectively, Congress criminalized the obtaining of credit reports under false pretenses and the unauthorized disclosure of consumer information when done "knowingly and willfully." Together, those terms

are understood to mean a conscious and intentional violation of a statute, *Black's Law Dictionary* 1012 (rev. 4th ed. 1968), and suggest a "bad purpose" component to "willfully" that is consonant with its traditional usage in criminal statutes, see *Bryan*, 524 U.S. at 191 & n.12; see also *United States* v. *Murdock*, 290 U.S. 389, 395 (1933), overruled in other part, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964).[12]

Petitioners, however, propound a reading of "willfully" that leaves little, if any, room between Congress's differently articulated criminal and civil provisions. See 06-84 Pet. 18 (requiring an "intentional refusal to abide by known legal requirements"); *id.* at 28; 06-100 Pet. 21. This Court should "refrain from concluding here that the differing language in the two subsections has the same meaning in each," especially when it would have the effect of equating the higher *mens rea* of the criminal prohibitions with the requirements of the distinctly worded civil provisions. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Third, petitioners' reading of "willfully" leaves no natural home in the structure of the liability provisions for reckless disregard of the FCRA's requirements. The FCRA authorizes civil damages actions for "willful noncompliance," 15 U.S.C. 1681n, and "negligent noncompliance," 15 U.S.C. 1681*o* (2000 & Supp. IV 2004). As between the two, the more natural and traditional home for liability based on reckless disregard is the willfulness

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[12] Tellingly, even in the criminal context, "willfully" has been understood to include reckless disregard of the law or the rights of others. See, *e.g.*, *Thurston*, 469 U.S. at 125-126 (equating its "reckless disregard" standard with the standard for establishing criminal liability under the FLSA).

provision. See *Hazen Paper*, *supra*; *Richland Shoe*, *supra*; *Thurston*, *supra*.

Furthermore, as petitioners note (06-84 Pet. 20-21; 06-100 Pet. 22), Congress considered and rejected a provision that would have made "gross negligence," rather than negligence, the standard for obtaining actual damages. As passed by the Senate, the predecessor bill to the FCRA dichotomized civil liability into "willful noncompliance" and "grossly negligent non-compliance." S. 823, 91st Cong., 1st Sess. § 617 (1969); see S. Rep. No. 517, *supra*, at 7. In the Conference Committee, the latter standard was lowered to mere negligence. H.R. Conf. Rep. No. 1587, 91st Cong., 2d Sess. 30 (1970).

Equating "gross negligence" with reckless disregard (06-84 Pet. 20; 06-100 Pet. 22), petitioners contend that Congress must have intended that the willfulness provision not extend to grossly negligent conduct. But "most courts consider that 'gross negligence' falls short of a reckless disregard of consequences," W. Prosser, *The Law of Torts* § 34, at 183 (4th ed. 1971), so the failure to incorporate a gross negligence standard into Section 1681*o* sheds little light on Congress's views regarding recklessness. Moreover, it is highly doubtful that the same Members of Congress who rejected "gross negligence" as too high a threshold for actual damages simultaneously concluded that the threshold for the further remedies of statutory and punitive damages should be as high as knowing conduct, and not reckless disregard. Petitioners' reading of the FCRA's text and legislative history is not only counterintuitive, but also would leave "reckless disregard" of the FCRA's terms a statutory orphan—a standard of culpability that sets too high a bar to fit logically within the Act's negligent non-compliance

provision and too low a bar to fall within the willful non-compliance provision.[13]

Fourth, petitioners argue (06-84 Pet. 23-24; 06-100 Pet. 15, 17) that "recklessness disregard" sets too low a threshold for punitive damages. But reckless disregard or indifference to federal rights is an established standard for punitive damages liability and a familiar one to businesses, including those involved in consumer reporting, see *Dun & Bradstreet, Inc.*, v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 751, 760-763 (1985) (plurality opinion) (credit reporting agencies favor a reckless-disregard standard). Indeed, a number of State consumer-reporting laws appear to impose the same or a similar standard for punitive damages, so it is a standard with which petitioners are already familiar when using consumer reports.[14]

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[13] Petitioners argue that Congress actually "consider[ed]" versions of the liability provision that would have allowed actual and punitive damages for "willful or grossly negligent" violations. See 06-100 Pet. 22 (emphasis omitted); see also 06-84 Pet. 21. That is a generous reading of the legislative history. The two House bills to which they refer never received a single day of debate or hearings, and never made it out of Committee, let alone the House. See H.R. 19403, § 52, 91st Cong., 2d Sess. (Sept. 22, 1970); H.R. 19410, § 52, 91st Cong., 2d Sess. (Sept. 22, 1970). Furthermore, even if a handful of Representatives were aware of that language, their failure to press for its enactment may well have reflected their concurrence with this Court's view that the "gross negligence" standard is "too vague, and too likely to be confused with mere ordinary negligence, to provide a fair standard" for punitive damages. *Smith*, 461 U.S. at 43; see *id.* at 49; *Farmer* v. *Brennan*, 511 U.S. 825, 836 n.4 (1994).

[14] See Cal. Civ. Code § 1785.20 (West 1998); *id.* §§ 1785.31, 1786.40 (West Supp. 2006); *Simms* v. *Royal Thrift & Loan Co.*, No. E028659, 2002 WL 32576, at *6 (Cal. Ct. App. Jan. 11, 2002) (unpub.) (violation is "willful" if "the defendant knowingly failed to fulfill an obligation without a good faith, reasonable belief in the legality of his or her

In addition, petitioners are already subject to punitive damages if they recklessly disregard the requirements of Title VII or the Americans with Disabilities Act. See 42 U.S.C. 1981a; *Kolstad*, *supra*. Reckless disregard is also the standard courts apply under the ADEA for liquidated damages, which are "punitive in nature,"

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actions"); Ariz. Rev. Stat. Ann. § 44-1695(C) (West 2003) ("grossly negligent"); *Armenta* v. *City of Casa Grande*, 71 P.3d 359, 364 (Ariz. Ct. App. 2003) (defining "[g]ross, willful, or wanton conduct" generally as "action or inaction with reckless indifference to the result or the rights or safety of others"); Kan. Stat. Ann. §§ 50-714, 50-715 (1994); *Reeves* v. *Carlson*, 969 P.2d 252, 256-257 (Kan. 1998) (in tort law, "willful" means a person has "knowledge of existing conditions and [is] aware * * * that [harm] will likely or probably result from his or her conduct, and with reckless indifference to the consequences, consciously does some act or omits to discharge some duty, which produces the injurious result"); Me. Rev. Stat. Ann. title 10, § 1320 (West Supp. 2005); *id.* § 1322 (West 1997); *Shrader-Miller* v. *Miller*, 855 A.2d 1139, 1144 (Me. 2004) (In tort law, "willfully" "mean[s] conduct displaying an 'utter and complete indifference to and disregard for the rights of others.'"); Md. Code Ann. Com. Law § 14-1212 (LexisNexis 2005); *id.* § 14-1213 (Supp. 2006); *Williams Constr. Co.* v. *Garrison*, 400 A.2d 22, 25 (Md. Ct. Spec. App. 1979) ("willful[ness] in worker's compensation law includes "the intentional doing of something * * * with a wanton and reckless disregard of its probable consequences"); Mont. Code Ann. §§ 31-3-131, 31-3-142, 33-18-608 (2005); *Cooper* v. *Rosston*, 756 P.2d 1125, 1130 (Mont. 1988) ("When a person knows or has reason to know facts which create a high degree of risk of harm to the substantial interests of another, and * * * recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the standard of willful, wanton, and/or reckless to which the law of this State will allow imposition of punitive damages."); N.Y. Gen. Bus. Law. § 380-i (McKinney 1996); *id.* § 380-*l* (Supp. 2006); *Welch* v. *Mr. Christmas Inc.*, 440 N.E.2d 1317, 1321 (N.Y. 1982) ("[R]ecovery of exemplary or punitive damages in a common-law action requires a showing of conscious disregard of the rights of others or conduct so reckless as to amount to such disregard."); see generally Restatement (Second) of Torts § 908(2) (1979).

Thurston, 469 U.S. at 125, under the Equal Credit Opportunity Act, 15 U.S.C. 1691e(b), and under a number of other federal laws.[15] Indeed, reckless disregard has already been determined to be an adequate shield even in areas of First Amendment concern, see *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).[16]

Finally, the question of how the FCRA responds to covered entities who recklessly disregard the statute's requirements is, at bottom, a question about Congress's level of tolerance for reckless disregard of the law. The FCRA is designed to protect individuals from abuse, to enhance individual privacy, and to promote integrity,

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[15] See, *e.g.*, *Barbour* v. *Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (42 U.S.C. 1981), cert. dismissed, 516 U.S. 1155 (1996); *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 909 (2d Cir. 1993) (Fair Housing Act, 42 U.S.C. 3601 *et seq.*); *United States* v. *Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992) (Fair Housing Act), cert. denied, 510 U.S. 812 (1993); *Asbury* v. *Brougham*, 866 F.2d 1276, 1282 (10th Cir. 1989) (42 U.S.C. 1982); *Stephens* v. *South Atl. Canners, Inc.*, 848 F.2d 484, 489-490, 492 & n.6 (4th Cir.) (42 U.S.C. 1981), cert. denied, 488 U.S. 996 (1988); *Williamson* v. *Handy Button Mach. Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987) (42 U.S.C. 1981); *Fischl* v. *General Motors Acceptance Corp.*, 708 F.2d 143, 148 (5th Cir. 1983) (Equal Credit Opportunity Act).

[16] Petitioner Safeco contends (06-84 Pet. 21) that Congress "implicitly endorse[d]" reading "willfully" to mean knowing violations of the law when it amended the FCRA in 1996 without changing the legal standard. There is nothing in the legislative history that supports that conclusion or, more particularly, that suggests that Congress understood the circuits' "conscious disregard" standard to exclude reckless disregard. Indeed, both the Third and Ninth Circuits have included "reckless disregard" within a "conscious disregard" standard, see 06-84 Pet. App. 127a; *Cushman*, 115 F.3d at 226-227, and other courts have used the phrases interchangeably in this context, see *Casella* v. *Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995), cert. denied, 517 U.S. 1150 (1996), and elsewhere, see, *e.g.*, *Bevolo* v. *Carter*, 447 F.3d 979, 982-984 (7th Cir. 2006); *Stuart* v. *United States*, 337 F.3d 31, 36 (1st Cir. 2003); *United States* v. *Gonsalves*, 435 F.3d 64, 70 (1st Cir. 2006).

efficiency, and reliability in the Nation's banking system. See 15 U.S.C. 1681(a)(1), (4) and (b). In the face of those critical interests, petitioners posit a statutory scheme that cares sufficiently little about non-compliance and the harms that it can cause as to treat ordinary negligence and heedless disregard of the law with equivalent censure. But the FCRA demands, as its starting point, that regulated entities take reasonable measures and strike reasonable balances in exercising their "grave responsibilities," 15 U.S.C. 1681(a)(4) and (b), purposes that cannot be reconciled with petitioners' proposed environment of broad tolerance for companies' reckless indifference to harm and failure to exercise even slight care in complying with the law.

C. Reckless Disregard Requires Indifference To Clearly Established Law Or The Disregard Of An Obvious And High Probability That Conduct Is Unlawful

While the court of appeals correctly held that "willfully" in the FCRA includes a reckless-disregard component, the court misconceived the import of that standard and misapplied it in these cases. For example, the court of appeals held that "implausible" interpretations (06-100 Pet. App. 34a) or knowing reliance on legal opinions "that provide creative but unlikely answers to 'issues of first impression'" (*id.* at 33a) constitute reckless disregard. The court further noted (*id.* at 34a) that whether consultation with attorneys would provide evidence of a lack of willfulness would depend upon the "unreasonableness" of the erroneous interpretation. That resembles a mere negligence standard, and thus sets too low a bar. See *Richland Shoe*, 486 U.S. at 134-135 & n.13.

To be sure, "the term recklessness is not self-defining," *Farmer* v. *Brennan*, 511 U.S. 825, 836 (1994), nor

capable of being cabined into "one infallible definition," *St. Amant* v. *Thompson*, 390 U.S. 727, 730 (1968). "Inevitably its outer limits will be marked out through case-by-case adjudication, as is true for so many legal standards." *Id.* at 730-731. Nevertheless, there are two essential aspects of "reckless disregard" in the civil context that should have guided the court's application.

First, recklessness bespeaks an aggravated or extreme departure from standards of ordinary care. In contrast to negligence, recklessness entails action or inaction "in the face of an *unjustifiably high risk* of harm" or unlawfulness, *Farmer*, 511 U.S. at 836 (emphasis added). The probability that harm or a violation of the law will result must be apparent to a "high degree." *Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 667 (1989). Accordingly, "[t]he usual meaning assigned to * * * 'reckless' * * * is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm [or illegality] would follow." Prosser, *supra*, § 34, at 185; see *Farmer*, 511 U.S. at 837.

Proof of such an aggravated deviation from the standard of ordinary care is necessary because "reckless disregard" is designed to capture two acute forms of culpability. The reckless-disregard standard reaches conduct that is so wrongful under the circumstances that it is a proxy for or functionally equivalent to knowing or intentional conduct, which can in some contexts be difficult to prove.[17] But when couched (as in the FCRA) in terms of

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[17] See, *e.g.*, *Barry* v. *Edmunds*, 116 U.S. 550, 563 (1886) (standard captures that "reckless indifference to the rights of others which is

reckless disregard of the law, the recklessness standard also captures failures to conform behavior to the law that are so extreme as to independently merit censure.[18]

Second, reckless disregard in the civil context is, at bottom, an objective standard. See *Farmer*, 511 U.S. at 836-837; Prosser, *supra*, § 34 at 185 ("an objective standard must of necessity in practice be applied"). That is even more true when, as here, the recklessness standard is framed in terms of compliance with the law, and the statutory standard itself is not necessarily well-established. Although inquiries into recklessness often take place in areas of well-established duties of care, in the statutory context, when the concern is whether the disregard of the law was reckless, the extent to which the law was well-established and clearly understood must be part of the analysis. Therefore, courts must undertake an objective inquiry to determine whether the defendant's conduct reflected a colorable interpretation of the law. But because the standard is recklessness, not negligence, more than mere unreasonableness or implausibility must be shown. See *Richland Shoe*, 486 U.S. at 134-135 & n.13. The plaintiff must demonstrate either that the legal position ran afoul of clearly established law or that

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equivalent to an intentional violation of them"); *Saba* v. *Compagnie Nationale Air France*, 78 F.3d 664, 667-668 (D.C. Cir. 1996) (in some statutes, reckless disregard "provid[es] a proxy" for knowing or intentional conduct, while "alleviat[ing] problems of proof").

[18] See, *e.g.*, *Illinois Cent.*, 303 U.S. at 243 (willfulness encompasses actions that either "intentionally disregard[] the statute or [are] plainly indifferent to its requirements"); *Brock*, 809 F.2d at 164 (in civil cases, a person acts willfully if "the offender shows 'indifference' to the rules; he need not be consciously aware that the conduct is forbidden at the time he performs it, but his state of mind must be such that, if he were informed of the rule, he would not care").

the defendant failed to act with necessary care in the face of a high and obvious risk of legal error. In other words, the defendant's determination of his legal obligations must be shown to have fallen outside the range of responsible judgment.[19] The reckless-disregard component of willfulness thus requires violation of clearly established law or indifference to an objectively high and obvious risk of unlawfulness.[20]

That purely legal inquiry into the objective recklessness of the defendant's failure to comply with the FCRA can, and generally should, be undertaken at an early stage in the case. Only if the defendant's failure to comply with the law was objectively reckless would it become necessary for a court to probe, as the court of appeals invited here (06-100 Pet. App. 33a-34a), the defendant's subjective good faith. Resolving the objective recklessness of the defendant's non-compliance with the law at the outset will (i) help to develop the contours of FCRA law, thereby providing prospective guidance concerning the law's requirements and reducing violations; (ii) "permit the resolution of many insubstantial claims on summary judgment," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); and (iii) minimize the significant intrusions on attorney-client privilege that often attend inquiries into

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[19] In that respect, the test is similar to the qualified-immunity inquiry into whether a defendant's conduct violated "clearly established law." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, this Court has acknowledged the overlap of the qualified-immunity inquiry and the "reckless disregard" standard. See *Smith*, 461 U.S. at 51-54.

[20] Cf. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (to overcome *Noerr-Pennington* immunity in antitrust law, the defendant's litigation position must have been "objectively baseless" and "objectively meritless").

subjective good faith compliance with the law, see 06-100 Pet. App. 34a.

The court of appeals deviated substantially from that framework. The court gave improper significance to allegedly improper motivations at the outset, 06-100 Pet. App. 33a, and inappropriately collapsed the objective and subjective components of recklessness into a single inquiry, inviting immediate inquiry on remand into the privileged advice of counsel, *id.* at 34a. The court also applied too diluted a standard for recklessness, suggesting that it can be satisfied by "unreasonableness," "unlikely answers," or "implausible interpretations," *id.* at 33a-34a. Because the court concluded that "at least some of the [defendants'] interpretations are implausible," and hence reckless under the court's analysis, and because the court ordered the case remanded for further proceedings "consistent with [its] opinion" setting forth an incorrect articulation of the governing recklessness standard (*id.* at 34a, 36a; see 06-84 Pet. App. 2a), the court's judgments cannot stand.

II. AN ADVERSE ACTION NOTICE IS REQUIRED WHEN THE CONTENT OF A CONSUMER'S CREDIT REPORT PREVENTED THE CONSUMER FROM OBTAINING A BETTER INSURANCE RATE

A. Providing A Higher Insurance Rate Based, In Part, On A Credit Report Constitutes An Adverse Action

The court of appeals correctly concluded in No. 06-100 (Pet. App. 20a-21a) that GEICO took an adverse action against Edo. The FCRA defines an adverse action in the insurance context as:

> a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable

> change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. 1681a(k)(1)(B)(i).[21]

GEICO concedes (06-100 Pet. App. 10a) that charging a new customer a higher rate than that available to other customers based, at least in part, on the customer's credit report can constitute an "increase in a[] charge for [insurance] * * * applied for," 15 U.S.C. 1681a(k)(1)(B)(i), and thus an adverse action. That concession was a wise one. The plain meaning of "increase" is "to become" or "to make" "greater in some respect." *Webster's Third New Int'l Dictionary* 1145 (1961); see *Webster's New Int'l Dictionary* 1260 (2d ed. 1958). When an insurer charges one new customer more than others based, at least in part, on the content of the customer's credit report, it requires no linguistic leaps to conclude that the insurer has "increase[d]" the insurance charge for that customer.

Nothing in the meaning or usage of that term in the FCRA presupposes that the baseline for determining whether a rate is greater must be a price previously paid by the same customer himself, as opposed to the price offered to others.[22] The FCRA's prohibitions are not

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[21] The FCRA defines "adverse action" differently depending on the type of transaction involved (*i.e.*, insurance, credit, employment, or licensing). See 15 U.S.C. 1681a(k)(1). This case concerns only the insurance provision.

[22] See 16 C.F.R. Pt. 600 App., at 519 (notice required if any adverse action is taken, even if the information is non-derogatory); 16 C.F.R. Pt. 698 App. H, at 552 (Notice of User Responsibilities) ("'adverse action' is defined very broadly" and includes any decision "hav[ing] a negative impact"); S. Rep. No. 209, 103d Cong., 1st Sess. 4, 8 (1993) (adverse action notice required "any time the permissible use of a report results

limited to repeat customers. Nor is such a reading required by common usage. Had Edo pulled into a gas station and been charged ten cents a gallon more because of his race, gender, or the fact that his license plate ended in an odd, rather than an even, number, Edo would have suffered an "increase[d]" charge for gasoline, regardless of whether he had ever purchased gasoline at that station before. See *Cornist* v. *B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001) (a charge imposed on credit purchasers of new cars was an "increase" over the price charged to cash customers).

GEICO argues (06-100 Pet. 25-29) that no adverse action occurred because it determined after the fact that Edo's rate would have been the same if no credit report had been requested and GEICO had instead applied a neutral credit score. GEICO does not dispute, however, that it, in fact, obtained and used Edo's actual credit score and, on that basis, charged him a higher rate for insurance than what was offered to certain other customers and what would have been offered to him if his credit score had been better. 06-100 Pet. App. 11a-12a, 14a. What GEICO *would have done* in the absence of a credit report is beside the point, because what GEICO *did*—use a credit report adversely without providing notice—violated the statute.[23]

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in an outcome adverse to the interests of the consumer"); H.R. Rep. No. 486, 103d Cong., 2d Sess. 26 (1994) (same); S. Rep. No. 517, *supra*, at 7 (adverse action notice required whenever a consumer is "charged a higher rate for * * * insurance" because of his credit report).

[23] Indeed, had GEICO not intended to use Edo's report in connection with the underwriting of insurance, such as to set his insurance rate, it would have obtained the report without any permissible purpose, in violation of 15 U.S.C. 1681b(a) (Supp. IV 2004).

Nothing in the FCRA conditions the existence of an adverse action on the absence of *post hoc* rationales for the higher rate. By the statute's plain terms, an "adverse action" requires nothing more than that the insurance company "take[] any adverse action," 15 U.S.C. 1681m(a)—such as an "increase" in the charge for insurance, 15 U.S.C. 1681a(k)(1)(B)(i)—"based in whole or in part on any information contained in a consumer report." 15 U.S.C. 1681m(a). If it does, an adverse action notice is required. *Ibid.* Properly understood, therefore, the adverse action occurred and was completed the moment Edo's insurance rate was set at a higher and less-preferable level based, at least in part, on his credit report—and, at that point, the obligation to issue an adverse-action notice was triggered. See *TRW*, 534 U.S. at 35 (under the FCRA, "[p]unitive damages * * * could presumably be awarded at the moment of TRW's alleged wrongdoing," regardless of whether and when actual damages might be established); cf. *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995).

Indeed, GEICO's position defies the statutory text and purpose. The FCRA's definition of an adverse action focuses on whether the credit report had a negative effect on Edo's insurance rate, not whether his rate nevertheless fell within some statistical median or "neutral" insurance rate for customers of similar backgrounds. GEICO's after-the-fact evidence may speak to whether actual damages accrue, *McKennon*, 513 U.S. at 360-362, but it says nothing about whether an adverse action was, in fact, taken based on his credit report.

Furthermore, the purpose of the adverse action notice is not to alert consumers only when a report is below average; it is to advise any affected consumer that the information in his report is not as good as it might be and

that the deficiency has had material consequence. Under the FCRA, each consumer plays a pivotal role in assuring the accuracy of his or her consumer report and thereby contributes to the integrity of the system as a whole. See *Philbin* v. *Trans Union Corp.*, 101 F.3d 957, 962 (3d Cir. 1996) (noting "the detrimental effects inaccurate information can visit upon both the individual consumer and the nation's economy as a whole"). It is the adverse action notice that generally triggers the consumer's role. In the absence of such notice, there may be nothing to alert the consumer to check the report and no information as to how to check a report. A consumer with perfect credit who should receive a discount, but instead is charged a higher rate based on a mistaken report that her credit is average is no less entitled to notice than a consumer with average credit who is charged a higher-than-average rate based on a mistaken report of a poor credit history.

Moreover, the obligation to provide notice is a consequence GEICO chose for itself. Nothing in federal law requires insurance companies to use credit reports in setting their rates. The FCRA simply requires that, if an insurance company opts to use the credit reporting system and enjoy its benefits, it must also comply with the FCRA's obligations. That ensures that the other side of the balance—the consumer's interest in being alerted when his credit rating denies him a benefit and the financial system's interest in ensuring the accuracy and integrity of consumer information—is maintained.

Safeco's and GEICO's concerns (06-84 Pet. 24; 06-100 Pet. 25-29) about the policy implications of applying the adverse action definition as it is written are neither well-founded nor properly directed. For the past four years, GEICO has been providing the requisite notices, without

any evidence of paralysis or unworkability induced by its compliance with the FCRA. 06-100 Pet. App. 14a. And in any event, petitioners could avoid the FCRA's obligations by not relying upon credit reports. Beyond that, objections to the requirements of the FCRA should be directed to Congress.

B. GEICO's Erroneous Understanding Of The Adverse Action Provision Was Not Willful

While GEICO erred in concluding that no adverse action report was required in Edo's situation, the district court's grant of summary judgment was proper because GEICO's departure from the FCRA's terms was not objectively reckless. The question whether an "increase[d]" charge can be made for any initial application for insurance was itself an issue of first impression, 06-100 Pet. App. 17a, and the legal novelty of that question was compounded in Edo's case because there was an alternative justification for the rate.

In addition, the statutory text is not so pellucid on the question as to render GEICO's position an extreme departure from the bounds of responsible judgment, as evidenced by the district court's judgment in GEICO's favor (06-100 Pet. App. 46a). See *id.* at 38a n.1 (describing GEICO's arguments as "well-reasoned and thoughtful"). Generally, "[i]f judges * * * disagree on a [legal] question, it is unfair to subject [defendants] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Nor had the Commission provided specific formal guidance on the question. Cf. *Thurston*, 469 U.S. at 129-130 (airlines' position not reckless where legal advice was sought and

position was within the range of reason).[24] Nothing in the statute's text, its established interpretation, agency guidance, court decisions, or the facts of the situation made it apparent that there was an objectively high risk that GEICO's construction of the law was wrong. As a result, GEICO's position did not reflect such an extreme departure from the range of responsible judgment as to be either tantamount to a knowing violation of the law or to reflect such heedless disregard of its duty to comply with the law as to be commensurately culpable.

CONCLUSION

The judgment of the court of appeals in No. 06-84 should be vacated and remanded, and the judgment in No. 06-100 should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
THOMAS G. HUNGAR
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General

WILLIAM BLUMENTHAL
General Counsel
JOHN F. DALY
Deputy General Counsel for Litigation
LAWRENCE DEMILLE-WAGMAN
Attorney
Federal Trade Commission

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[24] Commission staff had provided informal guidance advising that denying a new customer a better insurance rate wholly or partly because of information in the customer's credit report is an adverse action. See Letter from Hannah Stires, FTC, to James Ball (Mar. 1, 2000) <http://www.ftc.gov/os/statutes/fcra/ball.htm>.

APPENDIX

The following Sections are found in Title 15 of the United States Code.

§ 1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures.

It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard

to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

§ 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer report.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness,[1] credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

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[1] So in original. Probably should be "creditworthiness,".

(k) ADVERSE ACTION.—

(1) ACTIONS INCLUDED.—The term "adverse action"—

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means—

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is—

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) APPLICABLE FINDINGS, DECISIONS, COMMENTARY, AND ORDERS.—For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

* * * * *

§1681b. Permissible purposes of consumer reports

(a) In general

Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information—

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that—

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under Section 454 of the Social Security Act (42 U.S.C. § 654) for use to set an initial or modified child support award.

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§ 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall—

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically—

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains

files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right

(A) to obtain, under section 612 [§ 1681j], a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 611 [§ 1681i], with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies

(1) In general

Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness,[1] credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information

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[1] So in original. Probably should be "creditworthiness,".

shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate

(A) Duties, generally

If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall—

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described

An action referred to in subparagraph (A) is an adverse action described in section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1861a(k)(1)(B) of this title.

(C) Information described

Information referred to in subparagraph (A)—

(i) except as provided in clause (ii), is information that—

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on the basis of information obtained in consumer files

(1) In general

Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that

is provided to that person under section 1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that—

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness[2] or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

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[2] So in original. Probably should be "creditworthiness".

(2) Disclosure of address and telephone number; format

A statement under paragraph (1) shall—

(A) include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title; and

(B) be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration.

(3) Maintaining criteria on file

A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected

This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

(e) Red flag guidelines and regulations required

(1) Guidelines

The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title—

(A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary;

(B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers; and

(C) prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures—

(i) notifies the cardholder of the request at the former address of the cardholder and provides to

the cardholder a means of promptly reporting incorrect address changes;

(ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or

(iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(2) Criteria

(A) In general

In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.

(B) Inactive accounts

In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies and procedures that provide for notice to be given to a consumer in a manner reasonably designed to reduce the likelihood of identity theft with respect to such account.

(3) Consistency with verification requirements

Guidelines established pursuant to paragraph (1) shall

not be inconsistent with the policies and procedures required under section 5318(*l*) of title 31.

(f) Prohibition on sale or transfer of debt caused by identity theft

(1) In general

No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 605B has resulted from identity theft.

(2) Applicability

The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).

(3) Rule of construction

Nothing in this subsection shall be construed to prohibit—

(A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;

(B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or

(C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.

(g) Debt collector communications concerning identity theft

If a person acting as a debt collector (as that term is defined in subchapter V of this chapter on behalf of a third party that is a creditor or other user of a consumer

report is notified that any information relating to a debt that the person is attempting to collect may be fraudulent or may be the result of identity theft, that person shall—

(1) notify the third party that the information may be fraudulent or may be the result of identity theft; and

(2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.

(h) Duties of users in certain credit transactions

(1) In general

Subject to rules prescribed as provided in paragraph (6), if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with this subsection.

(2) Timing

The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or

grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).

(3) Exceptions

No notice shall be required from a person under this subsection if—

(A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or

(B) the person has provided or will provide a notice to the consumer under subsection (a) of this section in connection with the transaction.

(4) Other notice not sufficient

A person that is required to provide a notice under subsection (a) of this section cannot meet that requirement by providing a notice under this subsection.

(5) Content and delivery of notice

A notice under this subsection shall, at a minimum—

(A) include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report;

(B) identify the consumer reporting agency furnishing the report;

(C) include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge; and

(D) include the contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in section 603(p) of this title.

(6) Rulemaking

(A) Rules required

The Commission and the Board shall jointly prescribe rules.

(B) Content.

Rules required by subparagraph (A) shall address, but are not limited to—

(i) the form, content, time, and manner of delivery of any notice under this subsection;

(ii) clarification of the meaning of terms used in this subsection, including what credit terms are material, and when credit terms are materially less favorable;

(iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;

(iv) a model notice that may be used to comply with this subsection; and

(v) the timing of the notice required under paragraph (1), including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.

(7) Compliance

A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.

(8) Enforcement

(A) No civil actions

Sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement.

This section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section.

§ 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

§ 1681*o*. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

§ 1681p. Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this title may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of—

(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or

(2) 5 years after the date on which the violation that is the basis for such liability occurs.

§ 1681q. Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, imprisoned for not more than 2 years, or both.

§ 1681r. Unauthorized disclosures by officers or employees

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under Title 18, United States Code, imprisoned for not more than 2 years, or both.

§ 1681s. Administrative enforcement

(a) Enforcement by Federal Trade Commission.

(1) Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act [15 U.S.C.A. 41 et seq.] by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)] and shall be subject to enforcement by the Federal Trade Commission under section 5(b) thereof [15 U.S.C. 45(b)] with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets

any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title. Any person violating any of the provisions of this title shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this title.

(2)(A) In the event of a knowing violation, which constitutes a pattern or practice of violations of this title, the Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this title. In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation.

(B) In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(3) Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 1681s-2(a)(1) of this title unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and

the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.

(b) Enforcement by other agencies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of section 1681m of this title shall be enforced under

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act [12 U.S.C. 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part, and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this title, the State—

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover—

(i) damages for which the person is liable to such residents under sections 1681n and 1681*o*] as a result of the violation;

(ii) in the case of a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, damages for which the person would, but for section 1681s-2(c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than $1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Federal regulators

The State shall serve prior written notice of any action under paragraph (1) upon the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) of this section and provide the Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Federal Trade Commission or appropriate Federal regulator shall have the right—

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(3) Investigatory powers

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation on State action while Federal action pending

If the Federal Trade Commission or the appropriate Federal regulator has instituted a civil action or an administrative action under section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818] for a violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission or the appropriate Federal regulator for any violation of this title that is alleged in that complaint.

(5) Limitations on State actions for certain violations

(A) Violation of injunction required

A State may not bring an action against a person under paragraph (1)(B) for a violation described in any

of paragraphs (1) through (3) of section 1681s-2(c) of this title, unless—

(i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and

(ii) the person has violated the injunction.

(B) Limitation on damages recoverable

In an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, a State may not recover any damages incurred before the date of the violation of an injunction on which the action is based.

(d) Enforcement under other authority

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

(e) Regulatory authority

(1) The Federal banking agencies referred to in paragraphs (1) and (2) of subsection (b) of this section shall jointly prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraphs (1) and (2) of subsection (b) of this section, and the Board of

Governors of the Federal Reserve System shall have authority to prescribe regulations consistent with such joint regulations with respect to bank holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies.

(2) The Board of the National Credit Union Administration shall prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraph (3) of subsection (b) of this section.

(f) Coordination of consumer complaint investigations

(1) In general

Each consumer reporting agency described in section 1681a(p) of this title shall develop and maintain procedures for the referral to each other such agency of any consumer complaint received by the agency alleging identity theft, or requesting a fraud alert under section 1681c-1 of this title A or a block under section 1681c-2 of this title.

(2) Model form and procedure for reporting identity theft

The Commission, in consultation with the Federal banking agencies and the National Credit Union Administration, shall develop a model form and model procedures to be used by consumers who are victims of identity theft for contacting and informing creditors and consumer reporting agencies of the fraud.

(3) Annual summary reports

Each consumer reporting agency described in section 1681a(p) of this title shall submit an annual summary

report to the Commission on consumer complaints received by the agency on identity theft or fraud alerts.

(g) FTC regulation of coding of trade names

If the Commission determines that a person described in paragraph (9) of section 1681s-2(a) of this title has not met the requirements of such paragraph, the Commission shall take action to ensure the person's compliance with such paragraph, which may include issuing model guidance or prescribing reasonable policies and procedures, as necessary to ensure that such person complies with such paragraph.

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IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*, *Petitioners*,

v.

CHARLES BURR, *et al.*, *Respondents*.

GEICO GENERAL INSURANCE COMPANY, *et al.*, *Petitioners*,

v.

AJENE EDO, *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONERS

J. STEPHEN ZIELEZIENSKI
ALLAN J. STEIN
DAVID F. SNYDER
CATHERINE I. PAOLINO
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Suite 1000
Washington, D.C. 20036
(202) 828-7100

SETH P. WAXMAN
Counsel of Record
NOAH A. LEVINE
SHOSHANA L. GILLERS
LI YU
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a defendant can be found liable for a "willful" violation of the Fair Credit Reporting Act upon a finding of "reckless disregard" for the FCRA's requirements, absent a finding that the defendant knew its conduct violated the FCRA.

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INTEREST OF AMICUS CURIAE[1]

The American Insurance Association (AIA) is a national trade association representing companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA members underwrite over $120 billion in premiums each year and provide coverage in a broad range of personal and commercial lines of business. AIA regularly appears in judicial proceedings to inform courts about the implications of legal developments for its members. AIA participated in the Ninth Circuit, and at the certiorari stage in this Court, as amicus curiae in support of Petitioners.

Overturning the Ninth Circuit's interpretation of the Fair Credit Reporting Act (FCRA) is extremely important to AIA members. The Ninth Circuit's construction of the decades-old statute as imposing requirements on insurance companies that no court previously recognized, and its indication that defendants might be found liable for "willfully" violating these unprecedented requirements, despite their good-faith compliance efforts, threaten AIA members with substantial and severe liability.

STATEMENT

In the 1990s, many insurers began using credit-based insurance scores—scores derived from credit report information—in underwriting and pricing personal lines of insurance. The use of such scores enables insurers to rate insurance risks more accurately and, thus, to avoid subsidization by some consumers of the higher risks presented by other consumers. The more accurate classification of risk translates into lower premiums for many consumers and increased availability of coverage.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amicus curiae states that no counsel for a party authored this brief in whole or in part. No person or entity, other than amicus curiae and its members, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

The FCRA requires an entity that "takes any adverse action . . . based in whole or in part on any information contained in a consumer report" to issue an adverse-action notice to the affected consumer. 15 U.S.C. § 1681m(a). Each insurance company using insurance scores made a determination of what triggered its FCRA duty to provide adverse-action notices. Separate determinations made by different insurers, often on advice of counsel, resulted in various practices. Given the absence of any court decisions interpreting the FCRA's insurance adverse-action definition—15 U.S.C. § 1681a(k)(1)(B)(i)—or any binding agency regulations, insurers conformed their practices to their good-faith interpretations of the FCRA's text and any applicable state-law requirements.

Many insurers reasonably determined that the FCRA did not require adverse-action notices upon the setting of an initial rate for insurance and, accordingly, for a number of years, did not provide notices in such circumstances. Few, if any, insurers construed the FCRA to require adverse-action notices in the broad "best rate" circumstances now required by the Ninth Circuit—*i.e.*, whenever an insurer's consideration of a consumer's insurance score leads the insurer to set a higher insurance rate than the insurer would have set had it considered a hypothetical consumer with a top insurance score. Rationally construing the statute, many insurers instead determined the adverseness of using a consumer's credit report by isolating that use and its effect on a consumer's rate. In other words, insurers sought to identify when their use of a consumer's insurance score led them to set a higher insurance rate than would have been set had they not considered the score at all, and then issued adverse-action notices in those circumstances. It would have contradicted common sense to adopt the "best rate" construction and notify numerous consumers that they had been adversely affected when consideration of their insurance scores either had not affected their rates or had led to lower rates.

Many insurance company groups operate in an economically efficient, integrated fashion, in which a separate and distinct corporate entity provides centralized insurance, financial, technological, and management services to affiliated issuing insurers through written agreements. Often, this separate corporate entity obtains consumers' insurance scores and applies previously established rating criteria to determine an appropriate premium. Sometimes, a consumer's rate is affected by the placement of the consumer with one of several insurer affiliates within an integrated company group (where the affiliates offer different rating levels). Amicus knows of no company that believed, prior to the Ninth Circuit's decision, that entities other than the affiliated insurer that actually issued the relevant policy (or the affiliated entity that was responsible for denying coverage for the integrated company group altogether) must issue adverse-action notices.

In 2001 and 2002, a group of consumers initiated eight putative nationwide class actions in federal district court, alleging that Petitioners' and other insurers' adverse-action notice practices contravened the FCRA's requirements.[2] The complainants did not allege that they had suffered any actual damages, which a plaintiff must show to recover for a "negligent" violation of the FCRA. 15 U.S.C. § 1681o. Instead, the complainants sought the extraordinary remedy of statutory and punitive damages under § 1681n, which states that "[a]ny person who *willfully* fails to comply with any requirement imposed under [the Act] with respect to any consumer is liable to that consumer" for statutory damages of

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[2] *Ashby* v. *FICO*, CV 01-1446-BR (filed Sept. 28, 2001); *Willes* v. *State Farm Fire & Casualty*, CV 01-1457-BR (filed Oct. 1, 2001); *Spano* v. *Safeco Ins. Co. of Or.*, CV 01-1464-BR (filed Oct. 2, 2001); *Dikeman* v. *Progressive Corp.*, CV 01-01465-BR (filed Oct. 2, 2001); *Razilov* v. *AMCO Ins. Co.*, CV 01-1466-BR (filed Oct. 3, 2001); *Rausch* v. *Hartford Fin. Servs. Group*, CV 01-1529-BR (filed Oct. 16, 2001); *Mark* v. *Valley Ins. Co.*, No. CV01-1575-BR (filed Oct. 24, 2001); *Edo* v. *GEICO Cas. Co.*, CV 02-678-BR (filed May 24, 2002).

$100 to $1000, punitive damages, and attorneys fees. 15 U.S.C. § 1681n(a) (emphasis added).

The district court, addressing questions of national first impression, concluded in one of the cases that only the insurance affiliate to which a consumer applies can "take" an adverse action and therefore incur an obligation to issue a notice. *Willes* v. *State Farm Fire & Cas. Co.*, CV 01-1457-BR (D. Or. Sept. 9, 2003), *reprinted in* Pet. App., *State Farm Mut. Auto. Ins. Co.* v. *Willes*, No. 06-101, at 74a-75a (U.S. filed July 19, 2006). In another case, the court held that an "adverse action" does not occur when an insurer, on the basis of information in a consumer's credit report, sets an initial rate that is higher than the best available rate. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1318-1319 (D. Or. 2003). And, in yet another case, the court held that, at a minimum, no adverse action occurs when an insurer sets a rate that is the same as the rate it would have set had the consumer's credit report not been considered. *See* GEICO Pet. App. 39a, 46a. On appropriate motions, the court granted summary judgment to the insurers. At the time, the district court's decisions on these questions were the first and only reported opinions addressing the application of the FCRA's adverse-action notice requirement in this insurance context. *See id.*; *Spano* v. *SAFECO Ins. Co.*, 215 F.R.D. 601 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977 (D. Or. 2003).

Respondents in the two cases at bar, and the plaintiffs in the other similar cases, appealed to the Ninth Circuit. After three tries, spanning a five-month period during which the Ninth Circuit amended its decision twice in response to petitions for rehearing, the court of appeals reversed and remanded.

In its first try—an opinion issued August 4, 2005—a divided Ninth Circuit panel reversed the district court on each

of the FCRA issues described above.[3] In particular, the court of appeals held that an adverse action occurs when an insurer sets an initial rate that is higher than the rate the consumer would have been offered if his credit score had been better, and that any insurance entity with any relation to a rate or coverage decision for that consumer is obligated to send an adverse-action notice. Pet. App. 48a-54a, 57a-60a.[4]

The Ninth Circuit also rejected Petitioners' arguments that they were entitled to summary judgment because any alleged noncompliance could not have been "willfu[l]" under § 1681n. Pet. App. 65a-66a. The court construed the "willfulness" standard to encompass not only "conscious disregard" of known legal obligations, but also "recklessness." *Id.* at 62a. The court further found that a defendant may act "recklessly" if it adopts "unreasonable answers to issues of first impression" under the FCRA. *Id.* at 64a. Two members of the panel went further, concluding (apparently as a matter of law) that Petitioners' interpretations had been so "objectively unmeritorious" that they were reckless, and thus willful. *Id.* at 64a-65a. The panel majority did not explain how its conclusion could account for the fact that the district court—another Article III tribunal—had concluded that the FCRA "unambiguous[ly] and plainly" supported Petitioners' constructions of the statute. *Mark*, 275 F. Supp. 2d at 1318. Judge Bybee dissented, explaining that he "would not decide, as a matter of fact or law, that the insur-

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[3] The Ninth Circuit issued its primary decision in two consolidated cases—*Reynolds* v. *Hartford Financial Services Group, Inc.*, No. 03-35695, and *Edo* v. *GEICO Casualty Co.*, No. 04-35279. The court then resolved the appeal of Petitioner Safeco in an unpublished disposition, relying on the decision in the consolidated *Reynolds* and *Edo* cases. This brief uses the term "decision below" to refer to the Ninth Circuit's third decision under the consolidated *Reynolds* and *Edo* caption. *See infra* pp. 6-7.

[4] In this brief, citations to the "Pet. App." are to the Appendix to the Petition for Certiorari for Safeco Insurance Company unless otherwise indicated.

ance companies acted willfully" without further examination of that question. Pet. App. 67a-68a.

Joined by several amici, including the AIA, Petitioners sought rehearing en banc, noting that the Ninth Circuit's holding that adherence to an "unreasonable" legal interpretation may constitute willful noncompliance directly contradicted decisions of this Court. *See, e.g.*, Br. for Amici Curiae AIA and NAMIC in Support of Pet. for Reh'g En Banc 5-6 (citing *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (rejecting the proposition that "a finding of unreasonableness [would] suffice as proof of" willfulness), and *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 616 (1993)). In response, the Ninth Circuit issued an amended opinion that reached the same result but, without explanation, removed the words "reasonable" and "unreasonable" from its first decision and replaced them with the synonyms "tenable," "indefensible," and "implausible." Pet. App. 69a-99a. Judge Bybee again dissented. *Id.* at 99a-101a.

Petitioners once more sought rehearing en banc, and the Ninth Circuit issued another amended opinion. In its third try, the court retreated from its *sua sponte* finding that Petitioners had acted in willful noncompliance, instead remanding to the district court to decide whether Petitioners had "willfully" violated the FCRA. Pet. App. 129a. The court appeared to set forth a two-step framework for addressing that question under its "recklessness" standard: First, a court should determine whether a defendant adopted an interpretation of the FCRA that the court (in hindsight) finds "implausible." *Id.* If so, the court must then examine the "obviousness or unreasonableness of the erroneous interpretation" and, "[i]n some cases," "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* The Ninth Circuit noted that it found "some" of Petitioners' FCRA interpretations "implausible," without further specification, thus requiring the additional "recklessness" inquiry on remand. *Id.* The Ninth Circuit did not, however, specify how the district court should apply or otherwise employ the "un-

reasonableness" or "company[] decision" factors, what weight should be accorded each, or when examination of the second is even appropriate.

SUMMARY OF ARGUMENT

The decision below adopts an erroneous interpretation of the term "willfully" as used in 15 U.S.C. § 1681n(a). Amicus urges this Court to correct that construction for two primary reasons.

First, the Ninth Circuit's construction of the willful noncompliance provision as imposing a broad and loosely defined "recklessness" standard departs severely from the text and purpose of § 1681n(a). The true content and contours of the Ninth Circuit's "recklessness" standard can best be gleaned from the court of appeals' application in these very cases. The Ninth Circuit held that a court may find a defendant to have recklessly disregarded the FCRA even in circumstances where all of the following are true: (1) the text of the FCRA supports the defendant's construction or is at least ambiguous on the relevant issue; (2) the defendant construes the statute without the benefit of judicial precedent or binding agency determinations interpreting the statute's application to the relevant issue; (3) the defendant adopts a reasonable construction of the statute, which is later adopted by the first federal court to consider the relevant issue; and (4) the first court to construe the statute differently is the court of appeals in the very case challenging the relevant practice as a willful statutory violation, and the court of appeals does so only because it settles upon a novel interpretation of the relevant FCRA provision. As a result, instead of properly confining statutory and punitive damages under § 1681n(a) to egregious violations of the FCRA, the Ninth Circuit's "recklessness" construction authorizes the award of extraordinary damages even in cases in which a defendant's construction of the statute is objectively reasonable.

Second, the "recklessness" standard threatens substantial harm to the insurance industry. If allowed to stand, the

decisions below will authorize the imposition of staggering, class-based statutory and punitive damages in cases where consumers do not even claim to have suffered any actual damages. The potential damage awards would have severe consequences for insurers and consumers alike. Moreover, because questions of first impression regarding the FCRA may frequently arise in other insurance contexts, insurers will face the threat of similarly costly class-action litigation and liability for any interpretation of the Act that a court later deems "implausible." The Ninth Circuit's erroneous interpretation will also affect the many other businesses that routinely make use of consumer credit information. It is critical that this Court overturn the Ninth Circuit's interpretation to protect personal-lines insurers and other businesses from substantial damages that Congress never intended to impose.

ARGUMENT

I. THE NINTH CIRCUIT'S CONSTRUCTION OF "WILLFULLY" IN 15 U.S.C. § 1681n(a) AS IMPOSING BROAD AND LOOSELY-DEFINED RECKLESSNESS LIABILITY IS ERRONEOUS

A. The FCRA "Willful Noncompliance" Provision Limits Statutory And Punitive Damages To Egregious Violations Of The Act

Congress provided individuals with two primary private remedies for a defendant's violation of the FCRA. First, individuals may recover actual damages and reasonable attorneys fees for a defendant's "negligent noncompliance." 15 U.S.C. § 1681o. Second, in the more egregious circumstances where a defendant "*willfully* fails to comply" with the statute, Congress authorized a private right of action to recover statutory damages of $100 to $1000, punitive damages, and reasonable attorneys fees. *Id.* § 1681n(a).[5] The statutory text thus reserves the more substantial damages for those defendants whose culpability is most significant.

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[5] The FCRA also separately authorizes government enforcement of statutory requirements. *See* 15 U.S.C. § 1681s.

AIA concurs with the position taken by the majority of the courts of appeals—that Congress intended to limit liability under § 1681n(a) to those who "knowingly and intentionally commit[] an act in conscious disregard for the rights of the consumer." *Ausherman* v. *Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003).[6]

As Petitioners persuasively demonstrate, the legislative history demonstrates that Congress deliberately chose a narrow scope for the "willful noncompliance" provision, rejecting alternative legislative drafts that would have permitted the recovery of statutory and punitive damages for a broader scope of conduct—*i.e.*, both grossly negligent and willful violations. *See* H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970); *see also* Safeco Pet. Br. 25-26; GEICO Pet. Br. 33. The "knowing[] and intentional[]" construction both adheres to the statutory text and best reflects Congress's purpose in creating two separate private rights of action, in which the most substantial damages (and the *only penalties*) are reserved for the most culpable defendants. Congress intended less culpable transgressions, like those alleged to have occurred in these cases, to be remedied by private actions for "negligent noncompliance" or enforcement actions—not through the imposition of staggering, class-based statutory and punitive damages.

B. The Erroneousness Of The "Recklessness" Construction Is Apparent In The Ninth Circuit's Application Of The Standard

The true content and contours of the "recklessness" construction—and its danger—can best be discerned from the Ninth Circuit's application of the standard in these cases. Under that construction, statutory and punitive damages

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[6] *See also, e.g.*, *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357, 368 (8th Cir. 2002); *Cousin* v. *Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Casella* v. *Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995); *Zamora* v. *Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (*per curiam*).

would not be reserved for only the most culpable violations of the FCRA, as Congress intended, but rather could be imposed in even the most blameless of circumstances.

According to the Ninth Circuit, a defendant can "willfully" violate an FCRA statutory provision under its "recklessness" construction even where, as here, all of the following are true: (1) the text of the FCRA supports the defendant's construction or is at least ambiguous on the relevant issue; (2) there are no existing judicial decisions or binding agency regulations interpreting the FCRA to guide the defendant to a particular construction; (3) the defendant adopts a reasonable construction that is later adopted and confirmed by the first federal district court to consider the question; and (4) the defendant is subsequently found to have violated the statute only because it did not adopt a novel and unforeseeable construction of the statute, first announced in an appeal in the very case seeking statutory and punitive damages for the alleged willful noncompliance. Imposition of statutory and punitive damages in these circumstances is entirely inconsistent with the text and purpose of § 1681n(a).

1. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Determining Not To Send Notices Upon The Setting Of An Initial Insurance Rate

The Ninth Circuit's first departure from the text and purpose of § 1681n(a) is apparent in its conclusion that Petitioners could have "willfully" violated the FCRA by interpreting the adverse-action notice requirement not to apply to the setting of initial insurance rates.

The FCRA requires "users of consumer reports," including insurers, to provide notice to a consumer of "any adverse action . . . based in whole or in part on . . . a consumer report." 15 U.S.C. § 1681m(a)(1). An "adverse action" in the insurance context, in turn, is defined as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connec-

tion with the underwriting of insurance." *Id.* § 1681a(k)(1)(B)(i). The Ninth Circuit held that the establishment of an initial rate is covered by the statutory phrase "'increase in any charge' . . . for insurance." Pet. App. 114a. In particular, the court concluded that an insurer "increase[s]" a "charge" for insurance, based on a credit report, when the insurer "charg[es] a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report." *Id.* (emphasis added).

The Ninth Circuit's reading is contrary to the plain meaning of the statutory text. The court recognized that "'[i]ncrease' means to make something greater." Pet. App. 114a. Yet one cannot make "something" greater if that "something"—here a rate for the consumer—does not yet exist. This is not only the natural use of "increase," but also the way numerous courts, including the Ninth Circuit itself, previously have used the term.[7]

The Ninth Circuit rejected this customary meaning of "increase" based on a phrase found later in the "adverse action" definition: "any insurance, existing or applied for." The court assumed that Congress intended each of the various actions described in § 1681a(k)(1)(B)(i)—*e.g.*, "denial," "increase"—to modify both "existing" and "applied for" insurance. Pet. App. 115a.

That assumption is erroneous. The Ninth Circuit's reading ignores the reality that most of the actions described in § 1681a(k)(1)(B)(i) make sense only when read to modify either "existing" or "applied for" insurance, but not

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[7] *See Certain Underwriters at Lloyd's* v. *Montford*, 52 F.3d 219, 221 (9th Cir. 1995) ("The insured value . . . was initially set at $925,000, and was [later] increased to $1,050,000[.]"); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 558 (1962) (plurality op.); *Bernklau* v. *Principi*, 291 F.3d 795, 798 (Fed. Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1016 (10th Cir. 2002); *United States* v. *Schallom*, 998 F.2d 196, 199 (4th Cir. 1993) (*per curiam*); *United States* v. *Golden*, 954 F.2d 1413, 1415 (7th Cir. 1992).

both. For example, "cancellation" naturally modifies only "existing" insurance, as in the cancellation of an existing insurance policy based on information learned from a customer's credit report. One cannot "cancel" something that does not exist. The term "denial," on the other hand, naturally modifies only insurance that a consumer has "applied for," as in the denial of an application for insurance based on information in the applicant's credit report. Thus, insurers could reasonably interpret § 1681a(k)(1)(B)(i) as requiring notices for

- a "denial" of an "appli[cation]" for insurance,
- a "cancellation" of "existing" insurance,
- an "increase in any charge for . . . existing" insurance, or
- "a reduction or other adverse or unfavorable change in the terms of coverage or amount of . . . existing" insurance.

By stretching the term "increase" to modify both "existing" and "applied for" insurance, the Ninth Circuit effectively interpreted "increase" to mean establishing an insurance "charge" that does not yet exist and doing so at a level higher than might have been set under different circumstances. That reading strains the straightforward reading of the term.

The insurers' and district court's interpretation of the adverse-action notice requirement not to apply to the establishment of initial rates is far more faithful to the statutory text. Nevertheless, even were the Ninth Circuit correct, it stretches the willful noncompliance provision of § 1681n(a) beyond its properly limited sphere to hold that the contrary interpretation reached by the insurers and the district court amounts to a willful failure to comply with the FCRA. Insurers adopted their good-faith construction of the ambiguous adverse-action definition in the absence of any judicial precedent or binding agency regulations on the issue. Their interpretation in that context was more than reasonable, as demonstrated by the history of these cases. The district

court, in the first reported opinion to confront the issue, *agreed* with the insurers. *See Mark*, 275 F. Supp. 2d at 1318-1319. The Ninth Circuit's finding that a "recklessness" (and thus, willfulness) finding could be justified in these circumstances persuasively demonstrates why the "recklessness" construction of § 1681n(a) cannot be correct.

2. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Determining Not To Send Notices To All Persons Receiving Less Than The Best Rate

The Ninth Circuit's next departure is apparent in its conclusion that Petitioners could have "willfully" violated the FCRA by interpreting the adverse-action requirement differently from the Ninth Circuit's novel "best rate" construction. That "best rate" construction is not only far from obvious, it is in fact erroneous.

The text of the FCRA makes plain that a change in the terms of insurance is "adverse" if, as a result of the use of a credit report, the consumer is placed in a worse position. "Adverse" is commonly understood to mean "contrary to one's interests or welfare; harmful or unfavorable." *The American Heritage Dictionary of the English Language* (3d ed. 1992). Based on this ordinary meaning, many insurers reasonably interpreted the FCRA to require an adverse-action notice only when they set a rate, upon consideration of a consumer's credit report, higher than the rate they would have set had they not considered the consumer's credit report in the first instance.

The Ninth Circuit took a different view. The court held that an insurer must send an adverse-action notice in substantially broader and different circumstances—namely, "whenever a consumer pays a higher rate *because his credit rating is less than the top potential score.*" Pet. App. 118a (emphasis added). This "best rate" construction finds no support in the FCRA's text. The statute nowhere directs insurers to determine adverseness by comparing the use of a consumer's credit score to the use of a hypothetical "top potential score."

Under the Ninth Circuit's novel construction, the statute would counterintuitively require insurers to notify consumers that they were adversely affected by the use of their credit reports even if that use helped them, simply because it did not help them as much as use of a hypothetical "top" credit report would have. The Ninth Circuit's interpretation flies in the face of common sense. Congress could not have intended for insurers to misinform consumers receiving better insurance rates, by virtue of the insurers' use of the consumers' credit reports, that the consumers instead had been adversely affected by that use.

Recent congressional action confirms the Ninth Circuit's error. In 2003 Congress amended the FCRA to require creditors (but not insurers) to provide a separate "risk-based-pricing" notice to a consumer when the use of credit-report information results in an offer with "material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers." Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 311(a), 117 Stat. 1952, 1988 (codified at 15 U.S.C. § 1681m(h)(1)). This new provision specifies a baseline against which a creditor must measure the effect that use of credit-report information has had, and requires the creditor to provide a new type of notice to consumers when the creditor offers material terms that are below that baseline. Notably, the baseline is not the "best rate" available, as it is for the Ninth Circuit's interpretation of the adverse-action requirement. The 2003 amendment demonstrates that Congress knew how to link an FCRA notice requirement to the setting of a rate that is not as favorable as rates offered to other consumers. The FCRA's insurance-specific, adverse-action definition lacks any such language. The Ninth Circuit's construction would hold insurers to a higher standard than lenders, even though the only clear FCRA textual requirement for the provision of notices in this context is the risk-based pricing provision for lenders added by the 2003 FCRA amendments.

For the foregoing reasons, the Ninth Circuit's "best rate" construction is plainly erroneous. At a minimum, that construction was far from foreseeable, such that insurers' adoption of a contrary view could be termed "willful noncompliance" with the FCRA. Prior to the decision below, no court or binding agency regulation had construed the FCRA in the same way. The Ninth Circuit's determination that Petitioners could be subject to liability for statutory and punitive damages for not predicting the court's construction stretches § 1681n(a) far beyond the limited sphere envisioned by Congress.

3. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Determining That It Did Not Apply To Affiliates Who Neither Issue The Relevant Insurance Policy Nor Deny The Relevant Insurance Coverage

The Ninth Circuit also departed from the text and purpose of § 1681n(a) in concluding that certain insurance affiliate defendants—who neither issued, denied nor canceled the relevant insurance coverage—could have "willfully" violated the FCRA by not sending adverse-action notices.

There is no dispute that, if insurers act adversely on the basis of credit information, the FCRA requires that a notice of that adverse action to be sent to the affected consumer. But when a consumer submits an application to one of several affiliated entities, only the entity that issues the relevant insurance policy (and thus, for example, "charge[s]" a customer for insurance or "cancel[s]" that insurance) or the entity that "deni[es]" insurance coverage "takes" one of the "adverse actions" specified in § 1681a(k)(1)(B)(i). Only that entity is therefore required by the FCRA to send the consumer an adverse action notice. The Ninth Circuit erred in exposing additional insurer affiliates to liability if they do not send their own additional notices to the consumer or list themselves in a single, global notice. The court cast this unjustifiably wide net of liability by holding that any entity with any theoretical connection to an insurance rating decision "takes" an "adverse action" within the meaning of

§ 1681m(a), and therefore must provide an adverse-action notice to the affected consumer.

The Ninth Circuit's conclusion was based primarily on an incorrect piecing together of disparate statutory sections. The court emphasized two phrases: "any person" in § 1681m(a), and "in connection with the underwriting of insurance" in § 1681a(k)(1)(B)(i). The Ninth Circuit apparently believed that these phrases, if read together, reveal congressional intent to require any person with any theoretical connection to the purported adverse action to issue an adverse-action notice. *See* Pet. App. 122a. The terms are found in different statutory provisions, however, and there is no indication that Congress intended the meaning the Ninth Circuit adopted.

The Ninth Circuit also purported to ground its construction in the FCRA's purposes, but its ruling would disserve those very purposes. A single notice, provided by any single entity, is sufficient to alert a consumer that consideration of her credit report contributed to an adverse action. Requiring every insurance entity with any theoretical connection to the purported adverse action to issue additional notices, or requiring every such additional entity to be listed in a single notice, does nothing to enhance the consumer's understanding. In fact, such a requirement is likely only to confuse. Under the Ninth Circuit's holding, consumers must receive multiple notices from numerous insurance entities (or a single notice listing numerous such entities) with whom they have never had any interaction. Faced with flurries of such notices, many consumers likely would ignore them altogether. *See The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. On Banking, Housing, and Urban Affairs*, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) ("notices [given] too widely and in too many circumstances" can become "something that people ignore"). Such an outcome would be contrary to the FCRA's objectives.

Ultimately, the Ninth Circuit grounded its interpretation in reasoning that resembles the type of rulemaking that is not properly the province of an Article III court. Yet, as a court deciding a case or controversy, the Ninth Circuit did not provide interested parties the notice or opportunity for comment that would have accompanied a true administrative rulemaking. The court based its expansion of the adverse-action requirement on its conjecture that consumers probably do not "understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure." Pet. App. 124a. The court then asserted—without reference to statutory text, structure or legislative history—that Congress intended the FCRA to remedy this assumed lack of knowledge "[b]y imposing joint and several liability" on all insurance entities tangentially related to an insurance rating decision. *Id.*; *see id.* ("By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy."). From that speculative re-creation of congressional intent, the Ninth Circuit then fashioned from whole cloth new obligations that no court or agency had ever imposed.

The Ninth Circuit's novel interpretation was neither obvious nor correct. For this reason, the court's further holding that Petitioners' failure to predict the construction could support an award of statutory and punitive damages stretches the § 1681n(a) "willful noncompliance" provision beyond its intended coverage. Absent any judicial decision or binding agency regulations, Petitioners read the statute precisely as the first federal court to take up this issue did—the district court's decision in these cases. *See Razilov*, 242 F. Supp. 2d at 991.

4. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Sending Notices Satisfying The FCRA's Text, But Not The "Minimum" Requirements In The Ninth Circuit's Decision

The Ninth Circuit's final error is apparent in its finding that Petitioners could have "willfully" violated the FCRA by sending adverse-action notices that, in retrospect, did not accord with the court of appeals' newly announced "minimum" requirements for the content of such notices.

The Ninth Circuit acknowledged that the FCRA does not define the term "notice of an adverse action." Pet. App. 121a. The court nonetheless created its own rules—without urging by any party or amici, and without the benefit of briefing—respecting the information that must be included in such an adverse-action notice. *See id.* Significantly, the Ninth Circuit relegated the requirements that Congress and the Federal Trade Commission prescribed to a footnote, and supplemented the statutory language with additional requirements that the court deemed important. *See id.* & n.13. Thus, based on little more than its own conceptions of good policy, the court held that an adverse-action notice must "at a minimum," (1) "describe the action," (2) "specify the effect of the action upon the consumer," and (3) "identify the party or parties taking the action, and their respective roles." Pet. App. 121a.

No prior notice of these "minimum" requirements existed in either judicial precedent construing the adverse-action requirement or binding agency interpretations. In fact, most insurers could not have complied with the first and third requirements because, prior to the court of appeals' decision, it had not been contemplated that an insurer takes an "adverse action" in the "best rate" circumstances identified by the Ninth Circuit or that insurance affiliates that neither issue an insurance policy, cancel an insurance policy, nor deny coverage could be deemed to "take" an "adverse action."

* * *

The Ninth Circuit's application of the "recklessness" construction of § 1681n(a) in each of the four instances described above persuasively demonstrates why that construction should be rejected in favor of the view taken by the majority of the courts of appeals. By construing the term "willfully" to cover conduct that—for the reasons explained above—does not even qualify as "negligent," the Ninth Circuit's construction turns Congress's intent on its head. AIA respectfully submits that the Court should hold that one "willfully" violates the FCRA not through "recklessness," but only by knowingly and intentionally committing an act in conscious disregard for known legal rights of a consumer. Under that standard, it is indisputably clear that Petitioners cannot be subject to liability under § 1681n(a).

II. THE NINTH CIRCUIT'S HOLDING WOULD HAVE A SUBSTANTIAL, DAMAGING IMPACT ON THE INSURANCE INDUSTRY

The issues the Ninth Circuit addressed have substantial importance not just to the parties, but to all of the insurance industry, many of whose members interpreted the Act much as Petitioners did. The conclusions in the decision below expose insurers to statutory damages in situations that Congress did not intend, and to punitive damages even when they have sought in good faith to comply with the FCRA, including by seeking counsel's advice. This exposure threatens significant liability, with broad ramifications for the industry's ability to perform its important functions. Amicus estimates that since the beginning of 2001, more than 150 million new personal lines insurance policies have been written. Conservatively estimating that adverse-action violations might be found for half of those policies under the Ninth Circuit's incorrect constructions of the Act, the potential liability is staggering—particularly since the FCRA, unlike the Truth In Lending Act, does not impose a cap on total statutory damages available in class-action litigation. *Compare* 15 U.S.C. § 1681o(a)(1), *with id.* § 1640(a)(2)(B). Significantly, the Ninth Circuit decision sets the stage for these astronomical statutory damage awards, and for puni-

tive damage awards, in cases where consumers do not even allege that they suffered any actual damages. The decision below threatens to have a substantial and real impact on the operations of AIA's members. By removing enormous amounts of capital from the insurance system, such awards would inevitably harm the insurance marketplace.

In addition, the Ninth Circuit's decision has ramifications that extend beyond the specific issues addressed below. The FCRA intersects with the business of insurance in numerous ways. *See, e.g.*, 15 U.S.C. §§ 1681a(*l*), 1681b(a)(3)(C), 1681c(b), 1681m(d). If the Ninth Circuit's "reckless disregard" standard remains the law, insurers will face the prospect of severe class-action liability whenever a court might later decide (in hindsight) that insurers' answers to unsettled FCRA questions were "implausible." The nature of the FCRA is such that any single interpretation of an FCRA requirement frequently affects millions of transactions yearly. If a court later decides that adherence to such an interpretation was reckless, statutory damages of $100 to $1000 might be available for each of the millions of affected consumers, as well as punitive damages, resulting in potentially enormous liability. That result frustrates the very purposes the FCRA was designed to further. This effect is compounded by the Ninth Circuit's creation of an entirely novel standard for adjudicating a party's "willfulness" based on terms like "untenable," "creative," "implausible," and "indefensible." Those words carry no established meaning in other legal contexts, and only the Ninth Circuit knows their intended meaning here. The result is an unknown, unknowable standard that provides regulated parties no useful guidance.

CONCLUSION

The Court should reverse the judgments below and hold that, as a matter of law, Petitioners did not, and could not have, willfully violated the FCRA adverse-action requirement.

Respectfully submitted.

J. STEPHEN ZIELEZIENSKI
ALLAN J. STEIN
DAVID F. SNYDER
CATHERINE I. PAOLINO
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Suite 1000
Washington, D.C. 20036
(202) 828-7100

SETH P. WAXMAN
Counsel of Record
NOAH A. LEVINE
SHOSHANA L. GILLERS
LI YU
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

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Nos. 06-84 & 06-100

In The Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR,

Respondent.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

ANNE P. FORTNEY
Counsel of Record
JAMES CHAREQ
LISA C. DELESSIO
HUDSON COOK, LLP
1020 19th Street, NW
Washington, D.C. 20036
(202) 223-6930

November 13, 2006

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] *amicus curiae*, the Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioners Safeco Insurance Company of America, *et al.* and GEICO General Insurance Company, *et al.*

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 500 consumer credit and other specialized consumer reporting agencies operating in the United States and throughout the world.

In its more than ninety-year existence, CDIA has worked with the United States Congress and various state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer-related information, including credit reports. In this role, CDIA was a key participant in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments, including the 2003 amendments under the Fair and Accurate Credit Transactions Act. CDIA has also published, maintained and updated a manual entitled *How to Comply with the Fair Credit Reporting Act*, which is used by its members and their clients.

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[1] No counsel for a party authored any part of this brief. No person or entity, other than CDIA, made any monetary contribution to the preparation or submission of this brief. Letters memorializing the consent of all parties to the filing of *amicus* briefs are on file with the Clerk of the Court.

CDIA is vitally interested in the outcome of this case because the court of appeals' misstatement of the "willfulness" standard subjects CDIA's members, and the members' clients, to unforeseen, staggering liability. In addition, the court of appeals' error in defining "adverse action" in the insurance context subjects CDIA's members and their clients to exponentially increased administrative costs in preparing to respond to consumer inquiries that will result if the "adverse action" notice provisions apply to millions of consumers who were not subject to any negative action because of consumer report information.

Because CDIA has been involved in the consumer reporting industry for more than ninety years, representing a variety of consumer reporting entities, CDIA believes that its experience provides a unique perspective on the issues presented that will aid the Court in its decision.

THE CONSUMER REPORTING INDUSTRY

In enacting the FCRA, the U.S. Congress recognized that the efficient functioning of the consumer reporting industry was vital to the U.S. economy.[2] Today, billions of items of consumer data are voluntarily furnished to consumer reporting agencies each month by 30,000 data furnishers, resulting in the creation and maintenance of files on nearly 200 million consumers, with more than 1.5 billion consumer reports issued annually.[3]

Because consumer reports are compiled over the course of years, based on information obtained from different types of furnishers, and updated on a periodic, sometimes daily, basis; insurers, creditors, landlords and employers can obtain a far more detailed picture of the

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[2] 15 U.S.C. § 1681(a)(1); *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

[3] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9 (hereinafter "*FTC Accuracy Report to Congress*"), http://www.ftc.gov/reports/facta/ 041209factarpt.pdf.

risk presented by a particular consumer. The availability of such information allows users of consumer reports to make fast, reliable decisions about a prospective applicant.[4] By making reliable data available to insurers, creditors, employers, landlords, law enforcement and counter-terrorist agencies, consumer reporting agencies provide the information infrastructure that contributes to the soundness, safety and efficiency of employment, housing, insurance, banking, finance, retail credit and law enforcement systems in the United States.

The availability of consumer report information enables the consumer spending that accounts for over two-thirds of U.S. gross domestic product.[5] U.S. consumers have greater and more rapid access to credit, at a lower cost, than any other consumers in the world.[6] Moreover, the availability of standardized, reliable consumer report information makes it possible for creditors to bundle consumer credit portfolios and sell them to investors. A recent study concluded that U.S. mortgage rates are a full two percentage points lower than those in Europe because creditors are able to securitize and sell their mortgage loan portfolios.[7] As a result, U.S. consumers save as much as $100 billion each year due to the efficiency and liquidity made possible by the consumer reporting industry.[8]

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[4] Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation*, at vi (May 2003), http://www.ftc.gov/bcp/workshops/infoflows/statements/cate02.pdf (hereinafter "Staten and Cate, *The Impact of National Credit Reporting*"); *Id.*

[5] Staten and Cate, *The Impact of National Credit Reporting* at ii.

[6] *See* Walter F. Kitchenman, *U.S. Credit Reporting: Perceived Benefits Outweigh Privacy Concerns*, The Tower Group, at 5 (Jan. 1999) (hereinafter "Kitchenman, *U.S. Credit Reporting*").

[7] Kitchenman, *U.S. Credit Reporting*, at 7.

[8] Staten and Cate, *The Impact of National Credit Reporting* at 7; *see also,* Fred H. Cate and Richard J. Varn, *The Public Record: Information Privacy and Access – A New Framework for Finding the Balance*, at 11 (1999) http://it.ojp.gov/initiatives/files/Public_Record.pdf.

Credit scores and insurance scores are often provided to creditors and insurers, either as part of a more detailed consumer report or alone to assist the creditor or insurer in making risk determinations. Credit scores are based on an analysis of several factors including the consumer's payment history; the amount owed by the consumer; the length of the consumer's credit history; the consumer's recent applications for credit as well as other factors.[9] Insurance scores are developed using similar consumer report information. Credit scores predict the likelihood of credit default; insurance scores predict the likelihood that an insured will make a claim for a covered event during the policy period.[10]

The U.S. consumer reporting system evolved and operates on a purely voluntary basis. There is no legal requirement that any entity furnish information to a consumer reporting agency. If the providers of consumer reports and the furnishers of consumer report information must face company-crippling liability for the good-faith compliance decisions they make on a daily basis, there will be little incentive to participate in the consumer reporting process. If consumer reports become less complete and, consequently, less accurate, they will be less predictive. The result will be increased transaction costs whenever a creditor or insurer makes a risk determination, and thus increased costs to the consumer. Such an outcome would effectively undo the thirty-five years of progress in the consumer credit and insurance industries since the 1970 enactment of the FCRA.

SUMMARY OF ARGUMENT

This Court should reverse the court of appeals' decision to correct a fundamental misstatement of the law that

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[9] *See,* MyFICO, *What's In Your Score?*, http://www.myfico.com/CreditEducation/WhatsInYourScore.aspx; Vantagescore.com at http://www.vantagescore.com/consumerinfo.html.

[10] *Id.* at 1.

will subject consumer reporting agencies, users of consumer report information, and furnishers of information to virtually unlimited liability for their compliance decisions, most notably when struggling with novel interpretive issues arising from the FCRA's often ambiguous statutory language.

The FCRA is a complex statute, based on unique definitions, creating an intricate framework for regulating all aspects of consumer reporting. Select FCRA requirements are implemented by rules promulgated by the Federal Trade Commission ("FTC"), the federal banking agencies and the National Credit Union Administration ("NCUA").[11] However, for most FCRA provisions, there has been no rulemaking, leaving consumer reporting agencies, users of consumer reports and furnishers of consumer report information to interpret ambiguous language without definitive, authoritative guidance from any agency or court.

Consumer reporting agencies and users and furnishers of consumer report information are subject to civil liability, including statutory damages of up to $1,000 and punitive damages if they "willfully fail[] to comply with any requirement" imposed by the FCRA.[12] Because the FCRA does not limit damages in class actions, the potential liability is limited only by the number of consumers (200 million) on whom consumer reporting agencies maintain file information. The potential liability is, literally, in the hundreds of billions of dollars, often for alleged violations where there are no actual damages. This exposure coupled with the uncertainty regarding the legal obligations imposed by the Act create an environment

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[11] 15 U.S.C. § 1681a(s) (defining "Federal banking agency" by reference to section 3 of the Federal Deposit Insurance Act); *See*, 12 U.S.C. § 1813(z) ("The term 'Federal banking agency' means the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation.").

[12] 15 U.S.C. § 1681n(a).

where consumer reporting agencies, users and furnishers are frequently required to defend frivolous claims where there has been no willful violation.

The court of appeals' decision effectively eliminates one of the principal defenses available to any consumer reporting agency or user or furnisher of consumer report information when the law is unsettled but the company has made a good-faith effort to comply. Under the court of appeals' novel willfulness standard, a company can be held liable for willfully violating the Act when:

> (i) The compliance issue is one of first impression;
>
> (ii) The statutory provision creating the compliance obligation is ambiguous;
>
> (iii) The company obtains and follows the advice of counsel in developing its compliance approach; and
>
> (iv) The district court holds, as a matter of law, that the interpretation adopted and followed by the company complies with the FCRA.

The court of appeals incorrectly held that, in order to establish a willful violation under the FCRA, the plaintiff need not show that the defendant *knew* that its actions violated any statutory obligation or requirement, but only that its compliance solution was implausible, untenable or the result of creative lawyering.[13] As demonstrated in the very case before this Court, such slippery standards lead to results that cannot and should not be sustained. The court of appeals itself, in attempting to apply its willfulness standard, issued two prior opinions,[14] twice errantly holding as a matter of law that all of the defendants willfully violated the FCRA, before withdrawing those

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[13] *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006).

[14] *See, Reynolds v. Hartford Financial Services Group, Inc.*, 426 F.3d 1020 (9th Cir. 2005); *Reynolds v. Hartford Financial Services Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005).

opinions and issuing the opinion now before the Court.[15] Although the court of appeals ultimately withdrew its liability determination, its willfulness standard remained; that standard cannot be applied in a manner that comports with the language of the FCRA or the expressed intent of Congress.

If uncorrected, the court of appeals' decision leaves consumer reporting agencies, users of consumer report information, and furnishers of consumer report information to negotiate the FCRA's numerous compliance obstacles with the guillotine of willfulness poised to drop if a reviewing court determines that a particular decision, even in a case of first impression, is sufficiently "creative" or "unreasonable" that it rises to the level of "implausibility."

Finally, the court of appeals incorrectly interpreted the substantive adverse action notice requirement in a manner that is inconsistent with the language of the statute and that imposes compliance burdens upon consumer reporting agencies, users of consumer reports, and furnishers of consumer report information that could not have been intended by Congress.

ARGUMENT

I. THE COURT OF APPEALS' DECISION THREATENS THE CONSUMER REPORTING INDUSTRY WITH UNLIMITED LIABILITY.

The court of appeals held that:

> [A]s used in the FCRA, "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers

[15] In its original opinion, the majority found "[b]ecause the district judge has already ruled that the companies' positions on all of the principal issues were correct as a matter of law, she has also held, *a fortiori*, that the companies' positions were not unreasonable." *Reynolds*, 416 F.3d at 116 n.18.

> pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights."[16]

The court of appeals then explained that, in its view, "conscious disregard" can mean arriving at an "implausible" compliance determination or a determination that is the result of "creative lawyering."[17] In doing so, the court of appeals merged the FCRA's negligent liability standard with the willfulness liability standard. That is, according to the court, "[w]hether or not there is a willful disregard in a particular case may depend in part on the obviousness or *unreasonableness* of the erroneous interpretation."[18]

Civil liability for the negligent failure to comply with the FCRA is expressly limited to the recovery of actual damages and attorneys' fees.[19] The court of appeals' decision ignores this limitation. In the court of appeals' view, *unreasonable* compliance decisions can provide the basis for a claim that the FCRA has been willfully violated, thereby subjecting a defendant to statutory damages of up to $1,000 per violation; damages that are unlimited in the class action context, as well as punitive damages.

Consumer reporting agencies are sued literally hundreds of times each year.[20] Because of the availability of statutory damages without any need to establish actual harm, virtually all of these complaints allege that the consumer reporting agencies *willfully* violated the FCRA. Left uncorrected, the court of appeals' decision subjects consumer reporting agencies to potentially billions of dollars of liability for FCRA compliance determinations that are, at worst, *negligent* (*i.e.*, unreasonable) even when

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[16] *Id.* (citations omitted).

[17] *Reynolds*, 435 F.3d at 1099.

[18] *Id.* (emphasis added).

[19] 15 U.S.C. § 1681o.

[20] The number of lawsuits filed against consumer reporting agencies arise from fewer than 1/100,000th of the 1.5 billion consumer reports produced annually.

the compliance decision is endorsed by a U.S. District Court. For consumer reporting agencies, the result will be increased costs to account for the ever-present risk of staggering liability when making their compliance determinations, costs that will ultimately be borne by consumers.

A. The FCRA is a complex, often unclear, statutory regime.

The FCRA governs all aspects of consumer reporting. The FCRA contains 31 separate sections, 145 subsections, and approximately 34,000 words. Portions of the FCRA have been explained in an FTC Commentary that is now more than sixteen years old and which does not address any of the amendments added to the FCRA in 1996 or 2003.[21] The FTC staff has issued more than 100 staff attorney opinion letters attempting to explain various compliance obligations.[22] The 2003 amendments alone have been the subject of more than sixteen separate rulemakings by six different federal agencies, with more rulemaking scheduled.[23]

Since the 2003 amendments, some agencies have even failed to meet their statutory rulemaking deadlines. For example, when Congress amended the FCRA, it added a new notice requirement, applicable only to creditors.[24] The amendment creating the obligation required the FRB and the FTC to jointly issue implementing rules by December

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[21] 16 C.F.R. Pt. 600, App.

[22] *See*, http://www.ftc.gov/os/statutes/fcra/index.html.

[23] The Federal banking agencies are required to promulgate regulations "as necessary to carry out the purposes of the" FCRA. *See*, 15 U.S.C. § 1681s(e). In addition, in limited circumstances, the FTC and NCUA are also authorized to promulgate regulations implementing select portions of the FCRA. *See, e.g.*, 15 U.S.C. § 1681e(d)(2); 15 U.S.C. § 1681g(c)(3); 15 U.S.C. § 1681j(f)(2); *see also*, 15 U.S.C. § 1681b(g)(5); 15 U.S.C. § 1681c(h)(2)(A); 15 U.S.C. § 1681m(e)(1).

[24] 15 U.S.C. § 1681m(h).

1, 2004.[25] To date, almost two years after the initial rulemaking deadline, the rules have yet to be promulgated, or even proposed. When the rulemaking process is complete, creditors will be required to provide notice to consumers if the use of a credit report results in treatment that is less favorable than that received by other consumers. The subsection adding this risk-based pricing notice obligation contains language such as "material terms," "materially less favorable," "most favorable terms," and "substantial proportion of consumers."[26] The agencies' continued delay in rulemaking is just one of many indications of the FCRA's complexity and the inability of the federal agencies to define or explain many of the FCRA's terms.

In rulemaking under the FCRA, the agencies have defined, in detail, seemingly common terms such as "company,"[27] "consumer,"[28] "dispose,"[29] "disposing,"[30] "disposal,"[31] "file disclosure,"[32] "identifying information,"[33] "medical information,"[34] and "simple and easy to understand."[35] For other provisions, the agencies have remained silent. In the absence of guidance, consumer reporting agencies and users and furnishers of consumer report information must attempt to discern their obligations from the uncertain language of the FCRA, the smattering of

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[25] 15 U.S.C. § 1681m(h)(6).

[26] 15 U.S.C. § 1681m(h)(1).

[27] 12 C.F.R. § 41.3(d); 12 C.F.R. § 222.3(d); 12 C.F.R. § 334.3(d); 12 C.F.R. § 571.3(d); 12 C.F.R. § 717.3(d).

[28] 12 C.F.R. § 41.3(e); 12 C.F.R. § 222.3(e); 12 C.F.R. § 334.3(e); 12 C.F.R. § 571.3(e); 12 C.F.R. § 717.3(e).

[29] 16 C.F.R. § 682.1(c).

[30] *Id.*

[31] *Id.*

[32] 16 C.F.R. § 610.1(b)(7).

[33] 16 C.F.R. § 603.2(b).

[34] 12 C.F.R. § 41.3(k); 12 C.F.R. § 222.3(k); 12 C.F.R. § 232.1(c)(5); 12 C.F.R. § 334.3(k); 12 C.F.R. § 571.3(k); 12 C.F.R. § 717.3(k).

[35] 15 U.S.C. § 1681m(d)(2)(B); 16 C.F.R. § 642.2(a).

case law and a patchwork of informal agency pronouncements to the extent that they are helpful.

B. The FCRA includes terms that often have inconsistent or contradictory definitions or no definitions at all.

In the FCRA, even seemingly simple terms are not simply defined. Not only are the definitions often internally inconsistent, but courts interpreting the definitions often do so in a manner that imposes obligations upon consumer reporting agencies, users of consumer reports and furnishers of consumer report information that are not found in the language of the FCRA itself. Under the court of appeals' willfulness standard, misinterpreting such terms can result in unlimited liability.

For example, the term "firm offer of credit or insurance" is defined to mean "any offer of credit or insurance that will be honored. . . . "[36] The definition is then qualified. The offer, it turns out, is not so "firm" and it need not always be "honored."[37] Moreover, although the statutory language does not indicate that the offered credit must be of any particular value, the term "firm offer of credit" was interpreted by the Seventh Circuit Court of Appeals in November 2004 to require that the offer have "sufficient value."[38] The "sufficient value" standard is found nowhere in the FCRA or in any implementing rule and was not part of the firm offer of credit definition when the definition was added to the FCRA or when the Seventh Circuit rendered its decision. Nonetheless, following the decision, more than 250 putative class actions were filed against users of consumer report information alleging willful violations of the FCRA for having failed to make a firm

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[36] 15 U.S.C. § 1681a(l).

[37] 15 U.S.C. § 1681a(l); *see also, Kennedy v. Chase Manhattan Bank, USA, N.A.*, 369 F.3d 833, 840 (5th Cir. 2004) (explaining the additional conditions that may apply to a firm offer of credit).

[38] *Cole v. U.S. Capital*, 389 F.3d 719, 726 (7th Cir. 2004).

offer of credit of sufficient value. Now, in addition to the statutory definition, CDIA's members' clients, the users of consumer report information, must read into the definition of "firm offer of credit" a "sufficient value" concept found nowhere in the statute. If the firm offer of credit will not be of sufficient value, the user does not have a permissible purpose to obtain the consumer report and the consumer reporting agency may not furnish the consumer report to the user. The absence of a permissible purpose can give rise to a class action claim that the FCRA was willfully violated.

The "adverse action" definition, which is the subject of the appeal before this Court, also presents numerous inconsistencies and opportunities for misinterpretation. Adverse action means something different in the credit context than it means in the insurance or employment contexts.[39] In a credit transaction, a consumer report user would not take adverse action by failing to provide credit at an interest rate that was equal to the rate it would charge a hypothetical consumer with the top potential credit score.[40] In the insurance context, at least according to the court of appeals, the failure to offer insurance to a consumer at a premium rate equal to that which would be offered to a consumer with the top potential insurance score is adverse action.

Other provisions impose compliance obligations using terms that are undefined. For example, the FCRA requires that furnishers of consumer report information provide

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[39] In the credit context, the FCRA defines "adverse action" by incorporating the definition found in the Equal Credit Opportunity Act. 15 U.S.C. § 1681a(k)(1)(A). Adverse action in the credit context does not, however, include a counteroffer by a creditor that the consumer accepts. 12 C.F.R. § 202.2(c). In the employment context, "adverse action" means "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee. . . ." 15 U.S.C. § 1681a(k)(1)(B)(ii).

[40] *See*, 15 U.S.C. § 1681a(k)(1)(A); 15 U.S.C. § 1691(d)(6); 12 C.F.R. § 202.2(c)(1).

"accurate" information to consumer reporting agencies.[41] The FCRA also requires that consumer reporting agencies maintain "reasonable procedures" to assure "maximum possible accuracy"[42] when preparing a consumer report and imposes upon furnishers the obligation to investigate when a consumer disputes the "completeness" or "accuracy" of consumer report information.[43] The FCRA fails to define any of these critical terms, leaving consumer reporting agencies and furnishers to reach their own conclusions about the meaning of terms that are anything but clear. According to the FTC, "accuracy is a complex issue and presents challenges in defining and identifying errors."[44]

In the 2003 amendments to the FCRA, Congress required the FTC to study the accuracy and completeness of consumer reports and report to Congress.[45] In responding, the FTC reasoned that it must first study the "feasibility of a methodology" that will be used to assess accuracy and completeness.[46] In effect, although the accuracy and completeness requirements had been part of the FCRA for more than twenty-three years, as of 2004, the FTC did not know how to measure compliance with the requirement. Given the complexity of the credit reporting process under the FCRA, this was no surprise to the consumer reporting agencies who had struggled with this obligation for years.

Similarly, the meaning of "complete" for consumer reporting purposes remains unclear. As the FTC has

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[41] 15 U.S.C. § 1681s-2(a)(1)(A).

[42] 15 U.S.C. § 1681e(b).

[43] 15 U.S.C. § 1681s-2(b)(1)(D)-(E).

[44] *FTC Accuracy Report to Congress* at 22.

[45] *Id.; see also*, Federal Trade Commission, *Notice of Roundtable To Aid Federal Trade Commission Staff in Conducting a Study of the Accuracy and Completeness of Consumer Reports, Pursuant to Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, 69 Fed. Reg. 32549, 32550 (Jun. 10, 2004).

[46] *FTC Accuracy Report to Congress* at 32.

recognized, the FCRA itself and its amending legislation do not even agree on the meaning of "completeness."[47] A consumer may believe that a consumer report is "incomplete" because account information is not reported for every account the consumer has opened. The FCRA does not require any creditor or insurer to provide transaction and experience information to any consumer reporting agency. Because the consumer reporting system is voluntary,[48] it is possible that not all of the consumer's account information will be reflected in a consumer report.[49] For a consumer with a good payment history on a particular account, the absence of that information – *i.e.*, the report's incompleteness – may result in the consumer having a lower credit score. For a consumer who has missed a number of payments, the absence of this information will benefit the consumer and may result in the consumer having a higher credit score than would otherwise be the case if the report were complete. In both instances, the report is arguably "incomplete" because it does not contain all of the information regarding the consumer's credit history for every account the consumer has opened. The report, however, would be "complete" for FCRA purposes because the missing information was never reported to the consumer reporting agency.

Reflecting the difficulty in defining accuracy and completeness, courts have applied different tests to determine whether consumer report information is accurate or

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[47] *FTC Accuracy Report to Congress* at 5 n. 10.

[48] *See, Interagency Advance Notice of Proposed Rulemaking to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act*, 71 Fed. Reg. 14419, 14421 ("Most of the information that consumer reporting agencies collect and maintain is provided voluntarily by furnishers.").

[49] Some creditors do not furnish transaction and experience information at all while others only furnish such information to one or two of the nationwide consumer reporting agencies. *FTC Accuracy Report to Congress* at 12.

complete under the FCRA.[50] When courts have examined the issue under a standard of reasonableness, they have often applied a balancing test, pursuant to which the court weighs the potential that the information in a consumer report will create a misleading impression against the availability of more accurate or complete information and the burden of providing such information.[51] The consumer reporting agencies' obligation to follow reasonable procedures to assure the accuracy of consumer report information is appropriately examined under traditional tests for negligence.[52] Increasingly, however, plaintiffs allege that a consumer reporting agency's failure to follow reasonable procedures to assure accuracy constitutes a "willful" violation of the FCRA, not just a negligent violation.

If the court of appeals' decision is not reversed, other courts may conclude that a consumer reporting agency's negligence in preparing an "inaccurate" consumer report gives rise to a willful violation, even absent any actual damages. At the very least, the litigation risk would create serious disincentives for consumer reporting agencies to provide the robust consumer report information upon which the nation's economy has come to depend.

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[50] *Compare, e.g., Sepulvado v. CSC Credit Services, Inc.*, 158 F.3d 890, 896 (5th Cir. 1998), *cert. denied*, 526 U.S. 1044 (1999) (report is inaccurate when it is patently incorrect or misleading) *with Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, (D.C. Cir. 1984) (factual inaccuracy exists if information that is technically correct is misleading; and incomplete information is a type of inaccuracy distinct from misleading information); and *Dalton v. Capital Associated Industries*, 257 F.3d 409 (4th Cir. 2001) (reporting agency may be liable if a third party vendor reports information that is inaccurate because it is misleading).

[51] *Koropoulos*, 734 F.2d at 42; *Alexander v. Moore & Associates*, 553 F. Supp. 948 (D. Haw. 1982).

[52] *E.g., Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (D.C. Cir. 1984); *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98 (2d Cir. 1997).

C. The official guidance concerning FCRA compliance has been inconsistent, incomplete and, at times, rejected by the courts.

Because the FTC enforces the FCRA with respect to insurers and other users and furnishers of consumer report information, counsel for these companies have sought guidance from the FTC. They have obtained conflicting and often unhelpful advice. Courts that have considered the informal guidance provided by the FTC staff have sometimes rejected it as unpersuasive.[53] One district court, considering the FTC staff's opinion concerning the meaning of "increase" in the definition of adverse action for insurance purposes (one of the issues before this Court) rejected the FTC staff's views, in part, because the FTC's interpretation relied upon legislative history for previous proposed amendments to the definition of "adverse action" that were never enacted and that were substantially different from the enacted definition.[54]

The Federal banking agencies have also disagreed with the FTC's staff interpretation of the FCRA's provisions. For example, in July 2000, the FTC staff opined that a lender does not have a permissible purpose under the FCRA to obtain a consumer report on an individual who is the principal, owner, or officer of a commercial

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[53] *Scharpf v. AIG Marketing, Inc.*, 242 F. Supp. 2d 455, 465 (W.D.Ky. 2003) ("the [FTC] position should be followed to the extent persuasive." (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)). . . . however, the Court does not find the FTC's position to be persuasive."); *Milbauer v. TRW, Inc.*, 707 F.Supp. 92 (E.D.N.Y. 1989) ("the Court rejects the [Federal Trade] Commission's bright line approach to determine whether or not a consumer credit agency must respond to a consumer's inquiry.").

[54] *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1318 (D.Or. 2003) ("As a result, the Court concludes the legislative history relied on by [Plaintiff] does not indicate clearly that Congress meant something other than the plain meaning of the statutory language in § 1681a(k)(1) or that the Court's literal interpretation of that plain meaning is contrary to Congressional intent."), *abrogated by, Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006).

loan applicant.[55] In response to the staff attorney opinion letter, the Federal banking agencies wrote to the FTC,[56] expressing their belief:

> [T]hat a contrary view, as implied in the [FTC staff's] Tatelbaum Letter, raises concerns regarding safe and sound lending practices, operational efficiencies, and credit availability. Our interpretation of the FCRA, by contrast, would resolve those concerns in a manner that is fully consistent with the terms and purposes of the FCRA and that promotes prudent lending practices.[57]

Eleven months later, the FTC reversed itself, concluding that the FCRA permits a lender to obtain a consumer report in connection with a business credit transaction if the consumer will be personally liable.[58]

Given the court of appeals' willfulness standard, one must ask whether the court of appeals would have concluded, during the time between the two staff attorney opinion letters, or before the federal banking agencies objected, that a lender who obtained a consumer report on an individual who guaranteed a commercial loan had willfully violated the FCRA? If the lender relied on the advice of counsel to determine that it could obtain such a report, would the court of appeals have not only disagreed but concluded that the decision was unreasonable? These questions demonstrate the risk now faced by those who

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[55] FTC Staff Opinion Letter from David Medine to Charles Tatelbaum, p. 3-4, (Jul. 26, 2000).

[56] Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and Office of Thrift Supervision General Counsels' Letter to Federal Trade Commission, p. 2 (May 31, 2001), *available at* http://www.occ.treas.gov/ftp/advisory/2001-6a.pdf.

[57] *Id.*

[58] FTC Staff Opinion Letter from Joel Winston to Federal Banking Agency Counsels (Jun. 22, 2001).

must comply with the FCRA in the wake of the court of appeals' decision.

When attempting to comply with unclear provisions not explained in the FCRA's Commentary, case law, or other authoritative guidance, consumer reporting agencies and users and furnishers of consumer report information have often turned to the FTC for informal guidance in understanding their compliance obligations. In fact, one of the FTC's most senior staff attorneys responsible for FCRA enforcement recently testified in a pending case involving risk-based pricing that the FTC staff recognized that the insurance industry had a "difficult problem" drafting adverse action notices based on the FTC's informal interpretations, but that it was up to the "insurance lawyers to figure out what to do."[59]

The point here is not to highlight the FTC's change of position, or that courts have rejected its informal compliance determinations, or even to illustrate that the FTC has left those parties who seek its guidance to their own devices; but rather to demonstrate the complexity of the FCRA and the compliance challenges facing consumer reporting agencies and their clients.

D. The court of appeals' decision eliminates the protections provided by the FCRA's reasonableness standard.

The court of appeals' holding that "willfulness" can be established without conscious wrongdoing is inconsistent with the text and structure of the FCRA, the Act's balancing of the rights of consumers against the needs of the economy, and the legislative history of the Act.

Although the Act contains no express definition of the word "willful," the intended definition is illuminated by the other appearance of the word "willful" in the FCRA, in

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[59] Deposition of Clarke Brinckerhoff, *Ashby v. Farmers Insurance Company of Oregon et al.*, U.S. District Court for the District of Oregon, Case Number CV 01-1446 BR, Sept. 6, 2006, p. 91:3-91:16.

section 1681h(e). As this Court has repeatedly observed, "identical words used in different parts of the same act are intended to have the same meaning."[60] This maxim is especially applicable here, since section 1681h(e) makes explicit reference to section 1681n. Specifically, it provides that:

> Except as provided in sections ... [U.S.C. §§ 1681n and 1681o], no consumer may bring any action ... in the nature of defamation, invasion of privacy, or negligence against any consumer reporting agency, ... user ..., or any ... furnishe[r] ... except as to false information furnished *with malice or willful intent to injure* such consumer.[61]

The use of "willful" in § 1681h(e) is clearly inconsistent with the court of appeals' definition of willful as including mere recklessness. A "willful intent to injure" necessarily connotes *actual* intent, as it is impossible to see how a defendant may be in reckless disregard of its own "intent to injure."

Moreover, the court of appeals' watered-down standard of "willfulness" under which a legal judgment as to a "previously undecided question" can be a willful violation if it does not conform to "an answer ... [that] is objectively apparent,"[62] is dangerously inconsistent with the nature of the obligations set forth in the FCRA. The Act is designed to encourage consumer reporting agencies to make "reasonable" judgments that protect consumers without unduly limiting the flow of (or raising the price of) information that Congress understood to be critical to the proper functioning of American commerce. The court of appeals' willfulness standard, which threatens the

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[60] *IBP, Inc. v. Alvarez*, 546 U.S. 21, 23 (2005); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (applying the "normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning' ") (citations omitted).

[61] 15 U.S.C. § 1681h(e) (emphasis added).

[62] *Reynolds*, 435 F.3d 1099.

imposition of unlimited financial penalties based on standardless, *post hoc* determinations, upsets that balance by creating overwhelming incentives for consumer reporting agencies to err on the side of adopting procedures far more restrictive than what reasonableness would require.

Congress made a considered decision to avoid bright-line rules in many of the key provisions of the FCRA.[63] Instead it adopted a reasonableness-based approach designed to protect consumers while not unduly interfering with the important commercial purposes of credit reporting.[64] This approach cannot coexist with the imposition of punitive liability on the basis of a "willfulness" standard that does not require conscious wrongdoing. A reasonableness standard necessarily requires the exercise of judgment and discretion as to what the statute requires, and a jury or reviewing court, like the court of appeals in this case, may find even a good-faith interpretation of the requirements of the statute "implausible" and therefore (under the court of appeals' approach) potentially worthy of punishment. In particular, because reasonableness is often in the eye of the beholder, any consumer reporting agency that makes a decision that is not *maximally* protective of consumer rights necessarily "disregards" a risk that its actions will later be deemed "unreasonable"

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[63] *See, e.g.*, 15 U.S.C. § 1681(b); 15 U.S.C. § 1681e(a); 15 U.S.C. § 1681i(a)(1)(A); *see also*, 15 U.S.C. § 1681i(a)(5)(C); 15 U.S.C. § 1681s-2(a)(1)(A); 15 U.S.C. § 1681d(c); 15 U.S.C. § 1681m. Other provisions of the Act set forth obligations that depend on similarly generalized terms and/or require discretionary judgments. *E.g.*, 15 U.S.C. § 1681k(a)(2); 15 U.S.C. § 1681i(a)(5).

[64] The legislative history confirms that Congress sought to craft a regulatory regime that can "prevent consumers from being unjustly damaged by inaccurate credit reports" while avoiding "undue burdens on legitimate credit bureaus" that play a "vital role" in the nation's economy. *See* 115 Cong. Rec. 33412 (Nov. 6, 1969) (statement of Sen. Williams); *see also* 115 Cong. Rec. 33410 (Nov. 6, 1969) (statement of Sen. Proxmire) (observing that "I think we have a bill that will work . . . for the consumer and will protect the very important interests of a vital industry.").

and therefore "in contravention of the rights possessed by consumers pursuant to the FCRA."[65]

Under the court of appeals' approach, the only thing protecting such a consumer reporting agency from potentially unlimited punitive liability is the hope that a jury will later find that its disregard of that risk was not "reckless." The flimsiness of such protection necessarily imposes tremendous pressure on consumer reporting agencies to flee from the "reasonableness" standard Congress intended toward the most consumer-protective approach without regard to the effects on commerce or the increased costs passed on to all consumers.

These concerns about potential liability, moreover, are by no means hypothetical. The volume of FCRA litigation is large. There is an organized plaintiffs' bar and consumer reporting agencies, users and furnishers of consumer report information are sued hundreds of times each year, including in numerous class actions. Because consumer reporting agencies generate over 1.5 billion consumer reports per year relating to 200 million consumers, even a relatively minor or technical violation can expose consumer reporting agencies to crushing liability.[66] By removing the requirement that plaintiffs produce objective proof of conscious wrongdoing, the court of appeals' standard dramatically expands the potential liability of consumer reporting agencies, users and furnishers of consumer report information and increases the costs of defense for any case in which willfulness is alleged and class certification is sought.

This Court should reverse the court of appeals' decision and make clear that any finding of willfulness in the context of a claimed FCRA violation requires a showing

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[65] *Reynolds*, 435 F.3d at 1098.

[66] *See, e.g., Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J. dissenting from denial of certiorari) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion.").

that the consumer reporting agency, user or furnisher engaged in conscious wrongdoing and did not simply reach an incorrect and unreasonable conclusion as to the interpretation to be given to a not-yet-judicially-construed statutory obligation.

II. THE COURT OF APPEALS' INTERPRETATION OF "ADVERSE ACTION" WILL IMPOSE EXTRAORDINARY BURDENS UPON CONSUMER REPORTING AGENCIES THAT CONGRESS DID NOT INTEND.

The court of appeals held that any consumer who, based in whole or in part on consumer report information, does not receive the insurance premium rate that would be charged to a hypothetical consumer with the top potential insurance score has suffered adverse action.[67] The court's decision improperly defines "adverse action" in the insurance context in a manner that fails to achieve the policy objectives purportedly underlying the court's decision, and imposes enormous, counterproductive compliance burdens upon consumer reporting agencies, consumer report users and furnishers of consumer report information.

The court based its interpretation of "adverse action" on its belief that it "best comports with the stated purpose of the FCRA: to ensure the '[a]ccuracy and fairness' of credit reporting."[68] The court believed that its decision advanced this purpose by: (i) allowing consumers to check the accuracy of their consumer report information; and (ii) even when the information is accurate, giving consumers important information about the benefits of improving their credit report information.[69] The court's speculative basis for its decision does not comport with the manner in which insurers use insurance scores in setting premiums. As a result, the court's policy reasons for its interpretation

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[67] *Reynolds*, 435 F.3d at 1092.

[68] *Id.*

[69] *Id.*

are invalid and are inconsistent with the real effect on consumers.

Because insurance scores are very accurate predictors of loss, they are widely used in insurance underwriting.[70] As a result, insurers are able to offer as many as 70% of their customers lower premiums.[71] Thus, for the vast majority of consumers, the charge for insurance is *decreased* from the premium that the insurer would have charged without the use of insurance scores. However, very few consumers are charged the lowest possible insurance premium when an insurance company bases the premium in whole or in part on consumer report information including an insurance score.[72] Because these scores are comprised of many different factors, even a consumer with an unblemished credit history can have an insurance score that is less than the top potential score. For example, a consumer may have no delinquent payments in his credit history, but because payment history accounts for only one-third of the score; other factors such as the amount of outstanding credit or the length of the consumer's credit history may cause the consumer to have a reduced insurance score.[73] In this way, a consumer report

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[70] Insurance Information Institute, *The Use of Credit Information in Personal Lines of Insurance Underwriting*, p. 3 (June 2004), *available at*, http://www.iii.org/media/hottopics/insurance/creditscoring/credit_paper/.

[71] Frank M. Fitzgerald, Commissioner Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance* at 7 (2002), *available at* http://www.michigan.gov/documents/cis_ofis_credit_scoring_report_52885_7.pdf; National Association of Independent Insurers, *Statement to the Commissioner of Financial and Insurance Services Regarding the Use of Credit Information by Personal Lines Insurers*, p. 4 (June 16, 2002), *available at* http://www.michigan.gov/documents/cis_ofis_naii_statement_31885_7.pdf.

[72] *The Use of Credit Information in Personal Lines of Insurance Underwriting*, at 10 (only 11% of consumers have a FICO credit score of 800 or higher).

[73] Consumer Federation of America and Fair Isaac Corporation, *Your Credit Scores*, at 2 (2005), http://www.myfico.com/Downloads/Files/myFICO_CFA%20pamphlet.pdf; Vantage Score Solutions, LLC,

(Continued on following page)

that is accurate and complete, with no derogatory information, may cause a consumer to pay an insurance premium that is higher than the lowest premium available to a consumer with the top potential score. Because most consumers do not have the top potential score, according to the court of appeals' interpretation, the vast majority of insurance company customers suffer adverse action when they apply for insurance or renew an existing insurance policy, even when their insurance score actually reduces the premium they would otherwise be charged.[74] For consumer reporting agencies, such an outcome is not a mere academic exercise.

Millions of consumers obtain insurance from, or renew insurance with, insurers who use insurance scores to set initial premiums, or renew existing policies.[75] As a result of the court of appeals' decision, almost everyone who applies for insurance, or renews an existing policy, will receive an adverse action notice because they will be charged more than the lowest possible premium rate charged to those consumers with the top potential insurance score even when their credit or insurance score resulted in a lower premium. If uncorrected, the court of appeals' decision will result in the sending of tens of millions of adverse action notices each year to consumers who will be told they are the subjects of adverse action but whose consumer report information was accurate and contained no derogatory information.[76]

Consumer Information (2006), http://www.vantagescore.com/consumerinfo.html.

[74] *Reynolds*, 435 F.3d at 1092.

[75] *The Use of Credit Information in Personal Lines of Insurance Underwriting*, at 3 ("Because it has been shown to be such an accurate predictor of loss, some 90 percent of insurers use credit data in new business underwriting.").

[76] According to Fair Isaac, only 13% of the population has a credit score of 800 or higher on the FICO score range of 300 to 850. *MyFICO, Understanding Your Credit Score*, p. 7 (July 2005), available at http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf. If

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For consumer reporting agencies and furnishers of consumer report information, the provision of these millions of additional adverse action notices means exponentially higher administrative costs to respond to consumer inquiries and disputes. Every consumer who receives an adverse action notice must be informed of their right to dispute the accuracy or completeness of their consumer report information with the consumer reporting agency.[77] After being informed that they are the subject of adverse action, the consumers may dispute any part of the report. Even if the dispute is unwarranted, the consumer reporting agency must conduct a "reasonable investigation," notify the furnisher of the information in dispute and include "all relevant information" regarding the dispute that the consumer reporting agency receives from the consumer.[78] The furnisher who receives the dispute from the consumer reporting agency must conduct its own investigation with respect to the disputed information and report the results of the investigation to the consumer reporting agency.[79] The consumer reporting agency must then report the results of its investigation, including the furnisher's response, in writing, to the consumer.[80] The response may include yet another free consumer report.[81]

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insurance companies base their best premiums in part on a credit score of 800 or higher, about 174 million consumers are eligible for an adverse action notice according to the court of appeals' decision.

[77] 15 U.S.C. § 1681m(a)(3)(B). In addition, as part of the 2003 amendments to the FCRA, the consumer is now permitted to dispute the accuracy of the consumer report information directly with the furnisher and need not go through the consumer reporting agency. 15 U.S.C. § 1681s-2(a)(8). The furnisher who receives the dispute must conduct an investigation of the disputed information, review all of the relevant information provided by the consumer and report the results of the investigation to the consumer. *Id.*

[78] 15 U.S.C. § 1681i(a)(1)-(2).

[79] 15 U.S.C. § 1681s-2(b).

[80] 15 U.S.C. § 1681i(a)(6)(A).

[81] 15 U.S.C. § 1681i(a)(6)(B)(ii).

In addition to the cost of providing free consumer reports to consumers who were not the subject of true "adverse action" because their premiums actually were lower than they otherwise would have been, the court of appeals' decision will require consumer reporting agencies to hire hundreds of employees to respond to thousands of consumer calls inquiring as to the consumer report information that caused them to be the subject of "adverse action" notices.

The structure of the FCRA, particularly as amended in 2003, demonstrates that Congress could not have intended to impose so significant a burden on the consumer reporting agencies. In 2003, the FCRA was amended to permit consumers to obtain, free of charge, a copy of all consumer report information on the consumer maintained by each nationwide consumer reporting agency and each nationwide specialty consumer reporting agency.[82] This information may be obtained each year. Thus, consumers may obtain at least three consumer reports each year at no cost. If the court of appeals' interpretation is correct, then, knowing that the vast majority of all consumers would be entitled to obtain a free copy of their consumer report because they would suffer insurance adverse action,[83] Congress nonetheless amended the FCRA to provide yet more free copies of the same consumer report information to the same consumers. Such a result is demonstrably absurd and should be avoided.

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[82] 15 U.S.C. § 1681j(a)(1)(A).

[83] When insurance companies use insurance scores to set premiums at the time of policy renewal (usually annually), under the court of appeals' interpretation, consumers who are charged a premium other than the premium charged to the potential best customer based on consumer report information would be entitled to an adverse action notice.

III. THE COURT OF APPEALS' INTERPRETATION OF ADVERSE ACTION IGNORES THE FCRA'S ACTUAL LANGUAGE AND THE DRAFTING PROCESS LEADING TO THE 2003 AMENDMENTS.

In holding that adverse action includes those instances in which a consumer is not charged the same insurance premium rate that would be charged to another consumer with the top potential insurance score, the court of appeals ignores Congress' actual legislative determinations when amending the FCRA to add a risk-based pricing notice requirement in the credit context.[84]

When Congress wanted to add a requirement that consumer report users inform consumers when the consumers were being charged less favorable rates than other consumers, it did so expressly, in a separate subsection, requiring such notice whenever credit was offered "on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through" the consumer report user, "based in whole or in part on a consumer report."[85]

If the court of appeals is correct, then an even more onerous obligation was imposed upon insurers by negative implication. That is, because Congress *did not* amend the definition of "adverse action" in the insurance context,[86] the existing definition of adverse action means that each consumer who did not receive the lowest possible premium rate based on consumer report information – a rate offered only to the small fraction of insureds who have the top potential insurance score – was the subject of adverse action. The definition of adverse action in the insurance context says nothing about "top potential score" or "lowest possible premium," but the court of appeals reads these

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[84] 15 U.S.C. § 1681m(h).

[85] 15 U.S.C. § 1681m(h)(1).

[86] 15 U.S.C. § 1681a(k)(B)(i).

terms into the definition, despite Congress' demonstrated ability to make such distinctions when it so chooses.

The court of appeals' decision also ignores the legislative drafting process that led to the risk-based pricing notice in the credit context. Prior to the enactment of the 2003 amendments to the FCRA, in October 2003, the U.S. Senate Banking Committee staff circulated a draft amendment to the FCRA that would create a "risk-based pricing" notice for creditors *and insurers*.[87] Under this proposal, a consumer notice would be required "if any person uses a consumer report in connection with a grant, extension or other provision of credit *or insurance* on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person."[88] The notice would say, in pertinent part, that the "terms offered to the consumer were set based on information from a consumer report."[89]

The FTC wanted Congress to adopt the risk-based pricing amendment that included the reference to insurance and insurers.[90] To this end, the FTC met with insurance industry representatives to gain their support.[91] In return for the industry's support, the FTC was "willing to prepare [Senate Committee] report language to clarify the definition of adverse action" including a "move away from" the position previously articulated by the FTC staff in a staff opinion letter.[92]

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[87] October 14, 2003 email from Catherine Paolino to the Credit Task Force. A copy of the email and attached Senate Banking Committee fax appear at Appendix at A1-A5.

[88] Appendix at A3.

[89] Appendix at A4.

[90] *See* October 17, 2003 and October 20, 2003 emails from Catherine Paolina. A copy of the emails are attached at Appendix at A6-A11.

[91] Appendix at A6-A7.

[92] October 20, 2003 email. Appendix at A10-A11. The FTC's offer to "clarify" the FCRA's definition of "adverse action" in legislative history is inconsistent with the FTC's statements to the Ninth Circuit Court of Appeals that the FCRA was clear in the application of its adverse action

(Continued on following page)

The Senate Banking Committee staff decided to remove insurance from the scope of the risk-based pricing amendment, and the version Congress enacted as part of the 2003 amendments applied only to creditors.[93] If Congress had wanted to impose a risk-based pricing notice obligation upon insurers, the FTC would have written, and presumably Congress would have adopted, legislative history to that effect.[94]

This history reveals that a definition of "adverse action" in the insurance context that includes the *implicit* risk-based pricing component found by the court of appeals cannot be reconciled with Congress' demonstrated ability to impose such requirements expressly and the drafting history establishing that Congress considered such an explicit amendment and elected *not* to include it.

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notice requirements to insurance risk-based pricing based on credit reports and that any contrary interpretation was "absurd."

Brief of the Federal Trade Commission As *Amicus Curiae* Supporting Appellants and Urging Reversal, filed in *Reynolds v. Hartford Financial Services Group, Inc.*, Case No. 03-35695, pp. 13, 14, *available at* http://www.ftc.gov/ogc/briefs/fcrahartford.pdf. The audio recording of this Oral Argument is available at http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=2 (enter Case No. 03-35695).

[93] *See* 15 U.S.C. § 1681m(h). The risk-based notice provision is still not effective because, almost three years after its enactment, the FTC and the Federal Reserve Board have yet to promulgate rules to implement its requirements.

[94] The FTC's negotiations related to the risk-based pricing amendments also revealed that, despite the arguments contained in its *amicus* briefs filed in the appeals in *Reynolds v. Hartford* and the other cases appealed to the Ninth Circuit Court of Appeals, the FTC recognized that interpretations applying the FCRA's adverse action notice requirements to risk-based pricing insurance transactions created significant new compliance burdens, and that its policy concerns were satisfied in the form of adverse action notice given by insurers.

CONCLUSION

This Court should reverse the decision of the court of appeals because, if left uncorrected, the decision subjects consumer reporting agencies, users and furnishers of consumer report information to unlimited liability that is inconsistent with the language and structure of the FCRA. In correcting the court of appeals' error, this Court should hold that a willful violation of the FCRA can only be established by a showing that includes conscious wrongdoing. This Court should further hold that adverse action under the FCRA does not include the failure to charge the consumer the lowest possible insurance premium that would be charged to another consumer with the top potential insurance score.

Respectfully submitted,

ANNE P. FORTNEY
Counsel of Record
JAMES CHAREQ
LISA C. DELESSIO
HUDSON COOK, LLP
1020 19th Street, NW, 7th Floor
Washington, DC 20036
(202) 223-6930

November 13, 2006

From: Paolino, Catherine [CPaolino@aiadc.org]
Sent: Tuesday, October 14, 2003 8:28 AM
To: Credit Task Force; Baldini, Don; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Roeberg, Nicole; Cantor, Drew; Mercado, Moses; Bouchard, Francis; Callanan, Susan
Subject: FCRA – New Notice
Importance: High

Risk Based Pricing Notice.pdf

Though without much notice, please draw your attention to the attached before today's Credit Task Force call.

The Senate Banking Committee is reviewing this language presently. It would add a notice requirement "if any person uses a consumer report in connection with a grant, extension, or other provision of credit or insurance on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person, based in whole or in part on a consumer report, the person shall provide a notice to the consumer in the form and manner required by rules prescribed in accordance with this Subsection (e)." It has an exception if an adverse action notice was provided under Sec. 615(a) and it would require the FTC to make rules. Given the use of "material" and "substantial" the rules would be especially important.

<<Risk Based Pricing Notice.pdf>>

We seem to be hearing that the FTC is advocating this approach. Interestingly, it may imply a different approach to adverse action from the Ball informal opinion letter:

<http://www.ftc.gov/os/statutes/fcra/ball.htm>
http://www.ftc.gov/os/statutes/fcra/ball.htm

Here is a link to the FCRA as it presently stands:
<http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf>
http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf

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Risk-Based Pricing Notice

§ 603

(u) Credit and Creditor – The terms 'credit' and 'creditor' have the same meanings as in Section 702 of the Equal Credit Opportunity Act (15 U.S.C. 1691a).

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§ 615

(e) Duties of users in certain credit and insurance transactions.

(1) Subject to rules as provided in paragraph (5), if any person uses a consumer report in connection with a grant, extension or other provision of credit or insurance on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person, based in whole or in part on a consumer report, the person shall provide a notice to the consumer in the form and manner required by rules prescribed in accordance with this Subsection (e).

(2) Exceptions. No notice shall be required under this Subsection (e) if:

(A) The consumer applied for specific material terms and was granted those terms, UNLESS those terms were initially specified by the person after the transaction was initiated by the consumer and after it obtained a consumer report; or

(B) The person has provided or will provide a notice to the consumer under Subsection (a)

of this Section in connection with the transaction.

(3) A person that is obligated to provide a notice under Subsection (a) of this Section cannot meet that obligation by providing a notice under this Subsection (e).

(4) Content and Delivery of Notice. A notice under this Subsection (e) shall include at least the following information –

(A) That the terms offered to the consumer were set based on information from a consumer report;

(B) Identification of the consumer reporting agency that furnished that report;

(C) That the consumer can obtain a copy of a consumer report from that consumer reporting agency without charge; and

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10/14/03 TUE 09:27 FAX SENATE BANKING COMM 003

(D) The contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis).

(5) Rulemaking. The Federal Trade Commission and the Board of Governors of the Federal Reserve System shall jointly prescribe rules, in accordance with Section 553 of Title 5, United States Code, to carry out the purposes of this Subsection (e). These rules may address but are not limited to:

(A) The form, content, time, and manner of delivery of any notice under this Subsection (e);

(B) Clarification of the meaning of terms used in this Subsection (e), including what terms are material and when terms are materially less favorable;

(C) Exceptions to the notice requirement under this Subsection (e) for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers; and

(D) A model notice that may be used to comply with this Subsection (e).

****

Also, the bill must specify that:

Rulemaking. Regulations required by Section 615(e)(5) of the Fair Credit Reporting Act, as added by this Section, shall be issued in final form not later than one year after the enactment of this Act.

Effective Date. The amendments made by Subsection ___ shall become effective on the effective date of regulations prescribed in accordance with Subsection ___.

From: Paolino, Catherine [CPaolino@aiadc.org]
Sent: Friday, October 17, 2003 5:30 AM
To: Credit Task Force; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Mercado, Moses; Roeberg, Nicole; Cantor, Drew; Bouchard, Francis; Callanan, Susan; Karr, Gary
Subject: FCRA – New Notice

Importance: High

FCRA – AIA Review Notes on Ris . . .
Risk Based Pricing Notice.pdf

AIA met with the FTC yesterday. While interested in learning more about our industry, they were adamant about not removing insurance from this new risk based pricing notice, (e), and that they would not consider an exception that would allow an alternative initial notice. (The group we met with states that they believe they would be fair in rulemaking and that the existence of (e) helps them to back away from the Ball opinion letter interpreting adverse action in (a).) They seem to be under the impression that they can make (e)(1) reasonable and understandable for insurers through the rulemaking process. While perhaps this may be possible (at best) with respect to "material terms" and "materially less favorable," I do not understand how "available to a substantial proportion of consumers" could be quantifiable and workable in the insurance context. They said for example, if x% [some threshold amount] of your policyholders don't receive a particular specific rate, then the notice would be required. I hope you can help, either by explaining how this concept makes sense or by working with me to develop

real examples of why this is impracticable. They indicated that they would be willing to consider an alternative to the "substantial proportion" approach, but I do not know the degree of their receptivity. In any event, if we are going to respond with suggested language it will need to be asap today.

Lastly, the group we met with indicated that they will be looking for guidance as to how to accomplish the study.

Thanks once again.

-----Original Message-----
From: Paolino, Catherine
Sent: Wednesday, October 15, 2003 4:18 PM
To: Credit Task Force; Baldini, Don; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Mercado, Moses; Roeberg, Nicole; Cantor, Drew; Bouchard, Francis; Callanan, Susan

Subject: FCRA – New Notice
Importance: High

Kindly review my attached notes on this issue asap; they are mostly based on the Credit Task Force call yesterday afternoon. Please let me know your suggestions overall as well as your specific thoughts on advocating an initial notice requirement. Thank you for your help.

<<FCRA – AIA Review Notes on RiskBased Pricing Notice – 101503.doc>>

-----Original Message-----
From: Paolino, Catherine
Sent: Tuesday, October 14, 2003 11:28 AM

To: Credit Task Force; Baldini, Don; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Roeberg, Nicole; Cantor, Drew; Mercado, Moses; Bouchard, Francis; Callanan, Susan

Subject: FCRA – New Notice
Importance: High

Though without much notice, please draw your attention to the attached before today's Credit Task Force call.

The Senate Banking Committee is reviewing this language presently. It would add a notice requirement "if any person uses a consumer report in connection with a grant, extension, or other provision of credit or insurance on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person, based in whole or in part on a consumer report, the person shall provide a notice to the consumer in the form and manner required by rules prescribed in accordance with this Subsection (e)." It has an exception if an adverse action notice was provided under Sec. 615(a) and it would require the FTC to make rules. Given the use of "material" and "substantial" the rules would be especially important.

<<Risk Based Pricing Notice.pdf>>

We seem to be hearing that the FTC is advocating this approach. Interestingly, it may imply a different approach to adverse action from the Ball informal opinion letter:

<http://www.ftc.gov/os/statutes/fcra/ball.htm>
http://www.ftc.gov/os/statutes/fcra/ball.htm

Here is a link to the FCRA as it presently stands:

<http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf>
http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf

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From: Paolino, Catherine [CPaolino@aiadc.org]
Sent: Monday, October 20, 2003 11:29 AM
To: Credit Task Force; McNamara, Glenn; Callanan, Susan; Bouchard, Francis
Cc: Snyder, David; Cantor, Drew; Roeberg, Nicole; Mercado, Moses; Unnewehr, David; McManamy, Sean; Karr, Gary; Zielezienski, Stephen; Goldberg, Eric
Subject: FCRA – FTC – New Notice

Risk Based Pricing Notice – 10. . .
FCRA – AIA Review Notes on Ris. . .

Drew Cantor and I spoke again with Andrew Smith of the FTC this morning. We reviewed a number of issues, as outlined below.

SCOPE – He remains firm in his belief that all kinds of consumer reports should be subject to the notice requirement, not just those that relate to credit.

"TERMS OFFERED" INTERPRETATION – His thought with respect to (e)(4)(A) is that no further detail would be required for this item, only a simple statement that the consumer report was used to set the terms of the offer. He says that he understands that it would be an operational burden to itemize the ways that terms might differ and he recognizes that an adverse action notice puts people on the defensive and he pictures that this notice would [sic] neutral in nature. He indicated that he is willing to put together report language to this effect.

AMBIGUITIES, PRACTICAL PROBLEMS AND TRIGGER – He indicates that he is more concerned with over notification for adverse action than for this risked based pricing notice; he thinks it would be fine if everyone

who does not get an adverse action notice gets this general notice. If that is acceptable, the ambiguity in (e)(1) is not important and the issue turns on line between the adverse action notice and the risk based pricing notice (not the line between the risk based pricing notice and no notice). He indicated that he thinks this notice would be beneficial to insurers as there has been litigation both when adverse action notices are and are not provided. He stated that he would be willing to prepare report language to clarify the definition of "adverse action" (though it would be a move away from the Ball opinion letter, I do not know how he would propose to define the term).

Let's plan to discuss this on tomorrow's Credit Task Force call. Are there both pros and cons to this moving forward?

FYI – Attached are the draft and our notes.

<<Risk Based Pricing Notice – 101403.pdf>> <<FCRA – AIA Review Notes on RiskBased Pricing Notice – 101703.doc>>

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(640)

Nos. 06-84, 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR FARMERS INSURANCE COMPANY OF OREGON, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

THEODORE J. BOUTROUS, JR.
Counsel of Record
GAIL E. LEES
MARK A. PERRY
WILLIAM E. THOMSON
CHRISTOPHER CHORBA
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

BARNES H. ELLIS
JAMES N. WESTWOOD
TIMOTHY W. SNIDER
STOEL RIVES LLP
900 SW Fifth Avenue
Suite 2600
Portland, OR 97204
(503) 224-3380

Counsel for Amici Curiae

QUESTION ADDRESSED BY AMICI

Like other insurance companies, *amici* face a wave of nationwide class action litigation by private plaintiffs alleging "willful" violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (FCRA) and seeking to obtain aggregated "statutory" damages. In this brief, *amici* will address the following question:

Whether the Court should adopt objective guideposts that should serve as indicia that an insurance company has made a good-faith effort to comply with the FCRA's notice provisions, thus precluding a finding of willfulness. Specifically, *amici* propose that an insurance company may not be held liable for a "willful" violation of the FCRA if it: (1) acts in compliance with the requirements expressly set forth in the statute and in the sample notice formally adopted by the responsible federal agency, even if it does not strictly comply with subsequently adopted, judicially-created requirements; or (2) relies in good faith on the advice of counsel on statutory issues of first impression.

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BRIEF OF FARMERS INSURANCE CO. OF OREGON, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE[1]

Amici Curiae Farmers Insurance Company of Oregon, Inc., Farmers Group, Inc., and several of their affiliates (Farmers) are defendants in many nationwide class actions pending in federal courts throughout the country alleging violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (FCRA). *See, e.g., In re Farmers Ins. Co. FCRA Litig.*, No. 03-158, 2006 U.S. Dist. LEXIS 27290 (W.D. Okla. Apr. 13, 2006) (consolidated MDL proceeding); *Ashby v. Farmers Ins. Co. of Or.*, No. 01-1446, 2004 U.S. Dist. LEXIS 21060 (D. Or. Oct. 7, 2004) (Brown, J.). In each of these actions plaintiffs do not claim any actual injury or compensable loss.

Like petitioners and the other insurance company *amici*, Farmers is directly affected by the pernicious effects of the Ninth Circuit's expansive ruling in *Reynolds v. Hartford Fin. Servs. Group*, 435 F.3d 1081 (9th Cir. 2006). Farmers provided to its insureds FCRA notices that tracked exactly the content requirements of the statute and the sample notice promulgated by the Federal Trade Commission. *See Ashby*, 2004 U.S. Dist. LEXIS 21060, at *7-8. In light of the issues of first impression arising from application of the FCRA notice requirements to the insurance industry's use of credit information for risk-based pricing, Farmers obtained legal ad-

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

vice from knowledgeable counsel with expertise on FCRA issues. *See Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 3-4 (D. Or. Sept. 9, 2005); *id.*, slip op. at 2-3 (D. Or. Jan. 17, 2006). Yet despite these good faith efforts to comply, Farmers faces claims for several billions of dollars in aggregated statutory damages for alleged "willful" violations of the FCRA.

SUMMARY OF ARGUMENT

The Court has granted certiorari to determine whether the Ninth Circuit erred in holding that petitioners may be liable for "willfully" violating the FCRA. In this case, the Ninth Circuit interpreted the phrase "increase in any charge for . . . insurance" in the definition of "adverse action" (15 U.S.C. § 1681a(k)(1)(B)(i)) – the trigger requiring insurers to provide notices under the FCRA – to require insurers to send notices to consumers who received *discounts* on their insurance policies. The panel then imposed additional content requirements for these notices above and beyond those enumerated by the legislative and executive branches. It further compounded these errors by holding that the failure to abide by these new, judicially-created requirements may be a "willful" violation of the FCRA deserving of a potentially annihilating monetary sanction. There is no basis in the text of the statute, legislative history, or judicial precedent for these expansive interpretations.

In this brief, Farmers will propose two objective guideposts that should serve as indicia that an insurance company has made a good-faith effort to comply with the FCRA's notice provisions, thus precluding a finding of willfulness.

First, where an insurance company complies with the requirements expressly set forth in the statute and the sample notice formally adopted by the responsible federal agency, a court's *post hoc* decision to add extra-statutory notice requirements cannot be the basis for a finding of willfulness.

Second, an insurer's reliance on the advice of counsel in formulating its FCRA policies also precludes a finding of willfulness.

Either one of these factors alone negates the requisite state of mind to hold the defendant liable for statutory or punitive damages. Taken together, the factors demonstrate conclusively that a company acted in good faith and cannot be held liable for "willful" noncompliance with the FCRA.

ARGUMENT

As petitioners' briefs establish, "willfulness" requires a "knowing" disregard of the law, and not the lesser standard approximating gross negligence adopted by the Ninth Circuit. GEICO Pet. 22-24; Safeco Br. 17-37. Congress enacted a two-tiered standard for civil liability in the FCRA: A plaintiff may obtain actual damages on a showing of a "negligent" violation of the FCRA, *see* 15 U.S.C. § 1681o(a)(1), while punitive and statutory damages are available only on the higher showing of "willful" noncompliance. *Id.* § 1681n(a). It is axiomatic that a defendant must know what the law requires before being held liable for "willfully" violating that law. In its decision, however, the Ninth Circuit imposed a broad definition of "increase in any charge for . . . insurance" in the definition of "adverse action," and it also imposed new content requirements for FCRA notices that are nowhere to be found in the statute itself. *Reynolds*, 435 F.3d at 1094-95. Indeed, the court did not even purport to provide an "exhaustive" list of the content requirements, thereby leaving insurers in peril of a subsequent expansion of the list. *Id.* at 1085 n.2, 1095 n.14.

In light of the tremendous uncertainty posed by the Ninth Circuit's decision, under which an insurer's failure to comply with requirements that are announced *post hoc* by a federal court may lead to liability in private litigation, Farmers respectfully submits that the Court should articulate objective guideposts to which insurers can conform their FCRA policies and avoid a finding of willfulness. Farmers focuses on

two such criteria: compliance with the specific content requirements of the statute and formally promulgated FTC guidance; and reliance on the advice of counsel.

I. An Insurer Cannot Willfully Violate The FCRA By Acting In Compliance With The Requirements Expressly Set Forth In The Statute And Formal FTC Guidance

When an insurance company takes an "adverse action," which action is defined to include an "increase in any charge for . . . insurance," the FCRA requires that the insurer send the consumer a notice. 15 U.S.C. § 1681a(k)(1)(B)(i), § 1681m(a). The Ninth Circuit's decision interpreted these terms in an expansive manner that is not supported by the text of the statute or the legislative history. The court further erred by engrafting additional content requirements for "adverse action" notices beyond the discrete list set forth in Section 1681m(a)(1)-(3).

Farmers agrees with petitioners and other *amici* that charging anything less than the best possible rate is *not* an "increase in any charge for . . . insurance" constituting an "adverse action" that requires a notice under the FCRA, as the Ninth Circuit held. *See Reynolds*, 435 F.3d at 1093. Nonetheless, Farmers conservatively opted to issue "adverse action" notices to all insureds that informed them of the "action" (their premium, based in part on consumer information) and who did not receive the most favorable premium discount based in whole or in part on information contained in a consumer report. *In re Farmers Ins. Co.*, 2006 U.S. Dist. LEXIS 27290, at *9 n.4, 26 n.10.

The notices that Farmers sent, to a very broad group of insureds, included all of the content specified in the FCRA and in the sample notices formally promulgated by the FTC. But because the notices stopped short of affirmatively *characterizing* Farmers' pricing as "unfavorable" or "adverse," private plaintiffs have sued Farmers in federal courts across the country. Compliance with the express statutory and ad-

ministrative notice requirements, however, should preclude a finding of willfulness notwithstanding any additional requirements that might later be imposed by a federal court, including those that the Ninth Circuit erroneously adopted.

1. The FCRA provision at issue in these cases includes a discrete list of the required content for "adverse action" notices: (1) the adverse action (i.e., the premium, based in part on consumer information); (2) the name and contact information for the consumer reporting agency that furnished the report; (3) a statement that the reporting agency did not take the action and cannot explain the specific reasons for it; and (4) a notice of the consumer's rights to obtain a free copy of the report and to dispute the accuracy or completeness of this information. 15 U.S.C. § 1681m(a)(1)-(3). Farmers' notice contained all of this content. *See Ashby*, 2004 U.S. Dist. LEXIS 21060, at *7-8.

In its 1996 amendments to the FCRA, Congress directed the FTC to prescribe the required content of notices setting forth users' responsibilities and to promulgate a sample notice. *See* 15 U.S.C. § 1681e(d)(2) ("The Federal Trade Commission shall prescribe the content of notices . . . ."). Pursuant to this express statutory delegation, and after notice and an opportunity for comment, the FTC promulgated the following "Notice of Rights and Duties Under the Fair Credit Reporting Act":

> **Adverse Actions Based on Information Obtained From a [Consumer Reporting Agency ("CRA")]**
>
> If a user takes any type of adverse action that is based at least in part on information contained in a consumer report, the user is required by Section 615(a) of the FCRA [15 U.S.C. § 1681m(a)] to notify the consumer. The notification may be done in writing, orally, or by electronic means. It must include the following:
>
> - The name, address, and telephone number of the CRA (including a toll-free telephone number, if it is a nationwide CRA) that provided the report.

- A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made.
- A statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the CRA if the consumer requests the report within 60 days.
- A statement setting forth the consumer's right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.

15 C.F.R. pt. 601, App. C (62 Fed. Reg. 35,595, 35,596-97 (July 1, 1997); 69 Fed. Reg. 69,776, 69,798 (Nov. 30, 2004)). Once again, Farmers' notice contained all of this required information. *See Ashby*, 2004 U.S. Dist. LEXIS 21060, at *7-8.

Congress specifically directed that "a consumer reporting agency *shall be in compliance* with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Federal Trade Commission prescription under this paragraph." 15 U.S.C. § 1681e(d)(2) (emphasis added). *See also* 16 C.F.R. § 601.2 (providing that a consumer reporting agency that sends Appendix C is in compliance with its duties under 15 U.S.C. § 1681e(d) and § 1681g(c)).[2]

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[2] The FTC's sample notice is entitled to judicial deference because "Congress delegated authority to the agency generally to make rules carrying the force of law, and that . . . interpretation . . . was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). *See also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Yet, remarkably, the Ninth Circuit considered the text sufficiently "clear" and "unambiguous" to support a ruling "independent[] of" and without the need to "defer to" the FTC's interpretation. *Reynolds*, 435 F.3d at 1092 & n.9 ("As the statute's text

[Footnote continued on next page]

2. Without citing or considering the FTC's sample notice, the Ninth Circuit extended insurers' obligations well beyond these specific statutory and regulatory provisions and read several new content requirements into the statute. Under *Reynolds*, insurance companies now must also: (1) "describe the [adverse] action"; (2) "specify the effect of the action upon the consumer"; (3) "identify the party or parties to the action"; (4) "inform[] [the consumer] that his rate for insurance was increased because of information in his credit report" even if his rate is lower than it had been prior to consideration of credit report information; and (5) if a "family" of "affiliated companies [are] responsible for taking an adverse action," the insurer must "identif[y] those companies and their respective roles." *Reynolds*, 435 F.3d at 1084-85, 1094-95, 1096. Further, the Ninth Circuit made clear that it might add still additional – but presently unspecified – requirements in the future.[3]

The Ninth Circuit thus effectively rewrote the statutory language from "notice *of the* adverse action" (15 U.S.C. § 1681m(a)(1)) to "notice *that the action taken was adverse*" or "notice *why the action taken was adverse*." After acknowledging that "notice of the adverse action" was an undefined term in the FCRA, the Ninth Circuit panel engrafted new requirements that such a notice must contain. "[A]t a minimum," the court held, these notices must include more

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[Footnote continued from previous page]
is clear, we need not resort to either the agency's interpretations or the statute's legislative history.").

[3] The panel stated, "[w]e do not decide whether a fuller description of what specific information was adverse is required as this question is not before us." *Id.* at 1094 n.14. *See also id.* at 1085 n.2 ("We do not intend this list to be exhaustive."). Thus, the panel's decision is an invitation to private plaintiffs and the lower courts to hold insurance companies liable for "willful" noncompliance because they are unable to predict additional content requirements that may later be divined by the federal courts.

than the content requirements specified in Section 1681m(a)(2), and the insurer must, *inter alia*, "*describe* [and] . . . specify the effect of the action upon the consumer . . . ." *Reynolds*, 435 F.3d at 1094-95 (emphasis added).

The mere fact that Congress did not separately define "notice of the adverse action" is not a license for the courts to rewrite that phrase to impose additional obligations upon insurers. In fact, Congressional silence in this particular situation means just the opposite. Section 1681m(a), the notice provision at issue in these cases, stands in stark contrast to other provisions in the FCRA and related consumer protection statutes in which Congress expressly requires a characterization of the actions taken. For example, Section 1681j(b) states that a consumer is entitled to a free credit report "after receipt by such consumer of a notification pursuant to section 1681m of this title, or of a notification from a debt collection agency affiliated with that consumer reporting agency *stating that the consumer's credit rating may be or has been adversely affected*." 15 U.S.C. § 1681j(b) (emphasis added).

Here, Congress drew a distinction between a Section 1681m notification and a Section 1681j debt collection agency notification – and only the latter must contain a statement characterizing the action taken. This Court has explained the rule as "well settled" that the inclusion of particular language in one section of a statute, and the omission of that same language in another section, creates a general presumption "that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (internal citations omitted). The Ninth Circuit's decision flies in the face of that rule and is inconsistent with the structure of the statute.

The Ninth Circuit's reading also contravenes formal guidance from the FTC, the agency responsible for enforcing the FCRA against insurers. The FTC has published Commentary that is a "guideline intended to clarify how the

[FTC] will construe the FCRA in light of Congressional intent as reflected in the statute and its legislative history." 16 C.F.R. pt. 600 App. (Introduction ¶ 1). This Commentary clarifies that a user is not required to characterize or otherwise describe the action taken on the basis of consumer information: "Creditors should not confuse compliance with *section [1681m(a)], which only requires disclosure of the name and address of the consumer reporting agency*, and compliance with the Equal Credit Opportunity Act [ECOA], *. . . which require[s] disclosure of the reasons for adverse action.*" *Id. See* 12 C.F.R. § 202.9(b)(2) (requiring "statement of reasons for adverse action" for ECOA notices).[4]

Thus, neither Congress nor the responsible executive-branch agency has required insurers to characterize their pricing decisions as "unfavorable" – and for good reason: Characterizing FCRA notices as the Ninth Circuit has required would mislead a large number of consumers who received a benefit from the consultation of consumer information. Because many of these consumers received discounts, describing that favorable result as somehow "unfavorable" would confuse consumers and defeat the goal of the FCRA to provide accurate information. *See generally* 15 U.S.C. § 1681 (congressional findings); *Matthiesen v. Banc One Mortg. Corp.*, 173 F.3d 1242, 1245 (10th Cir. 1999) ("The purpose of FCRA is to ensure accuracy and fairness in credit reporting and to require that such reporting is confidential, accurate, relevant, and proper.").

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[4] *See also* Official Staff Commentary to Regulation B, 12 C.F.R. pt. 202, cmt. 202.9(b)(2)-9 ("The ECOA requires disclosure of the principal reasons for denying or taking other adverse action on an application for an extension of credit. The Fair Credit Reporting Act (FCRA) requires a creditor to disclose when it has based its decision in whole or in part on information from a source other than the applicant or from its own files.").

Farmers and other insurers should not be penalized for complying with the specific content requirements of the statute itself. But most certainly these insurers cannot "willfully" violate the statute based on the Ninth Circuit's freshly-minted content addenda.

3. As a matter of law, providing an "adverse action" notice that contains the requisite content specified by Congress and the FTC cannot constitute "willful" noncompliance. *Amici* are aware of no case in which compliance with an agency standard has been ruled a willful violation of the statute addressed by the standard. Instead, federal appellate decisions in analogous circumstances hold that the opposite is true, that compliance with agency interpretations disproves "willfulness."

As one court has explained, a defendant's good faith compliance with agency standards negates a finding of willfulness: "A company cannot be found to have willfully violated a standard if it exhibited a good faith, reasonable belief that its conduct conformed to law, . . . or if it made a good faith effort to comply with a standard . . . ." *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1263 (D.C. Cir. 2003) (citations omitted). *See also Cook v. United States*, 855 F.2d 848, 850 (Fed. Cir. 1988) (declaring *per se* rule that the federal agency's reliance in good faith on the Secretary of Labor's advice disproved a "willful" violation of the Fair Labor Standards Act).[5]

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[5] Other decisions confirm that good faith efforts to comply with regulatory standards cannot support a finding of a "willful" violation of regulations. *Accord A.J. McNulty & Co. v. Sec'y of Labor*, 283 F.3d 328, 338 (D.C. Cir. 2002) ("A good faith, reasonable belief by an employer that its conduct conformed to the law negates a finding of willfulness.") (quoting *Sec'y of Labor v. Keco Indus.*, No. 81-263, 1987 WL 89096, at *11 (O.S.H.R.C. Mar. 27, 1987); *McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1047 (7th

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Indeed, numerous courts have held that compliance with government standards is so plainly inconsistent with a finding of malice or conscious wrongdoing that it bars the imposition of punitive damages altogether. *See, e.g., Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (punitive damage award barred in part because no government agency had ever required certain design feature); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (punitive damages prohibited where defendant complied with federal safety standards); W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 n.41 (5th ed. 1984) ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages.").

An insurer's ability to rely on the plain language of the statute is particularly important where, as here, it has not been subject to extensive prior construction. For example, in *Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993), the Fifth Circuit considered whether the defendant willfully violated the provision of the FCRA now contained in 15 U.S.C. § 1681m(d)(1), which requires that written solicitations contain a "clear and conspicuous" disclosure of certain information. The court held that the defendants' conduct was not "willful" because there was no legal authority, either in the statute or from the FTC, articulating just how conspicuous the required FCRA notice must be. *Id.* at 294-96 ("There was no prior guidance to suggest that TRW's notice was insufficient, and we cannot conclude that TRW knowingly and intentionally obscured the notice in conscious disregard of consumers' rights."). The court reversed the award of puni-

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Cir. 1989) ("A violation is not willful when it is based on a non-frivolous interpretation of [an agency's] regulations.").

tive damages on the ground that the defendants' conduct was not willful. *Id.* at 296.[6]

4. Permitting a court to find a willful violation based on an interpretation of the FCRA requiring content beyond that expressly set forth in the applicable statute and FTC's formally promulgated sample notice – especially in the absence of any prior, settled judicial, administrative, or industry construction to the contrary – would raise serious due process issues.

A finding of willfulness subjects the defendant to potentially massive statutory and punitive damages.[7] This Court

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[6] *Accord Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995) (affirming dismissal of claim alleging willful violation of law "[b]ecause this is a case of first impression"); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 702-03 (3d Cir. 1994) (refusing to find defendants liable for a "willful" violation of the FLSA in a "case of first impression" because the defendants "did not in any way thwart settled FLSA doctrine"); *Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985) (finding no willful violation because "case law was split at that time"); *Murray v. New Cingular Wireless Servs., Inc.*, 432 F. Supp. 2d 788, 794 (N.D. Ill. 2006) (holding that defendant's notice violated the "clear and conspicuous" requirement of the FCRA, but that this violation was not "willful" because there was insufficient guidance for defendant); *Menton v. Experian Corp.*, No. 02-4687, 2003 WL 21692820, at *4 (S.D.N.Y. July 21, 2003) (refusing to hold defendant liable for "willful" violation of the FCRA based on the fact that it "narrowly construed" an "undefined" statutory term and defendant acted without "the benefit of prior court decisions addressing this issue"); *Hearst Corp. v. Stark*, 639 F. Supp. 970, 980 (N.D. Cal. 1986) (no finding of willful copyright infringement as a matter of law when wrongfulness of defendant's action depended on unsettled question of law).

[7] Whether denominated "statutory" or "punitive," damages awarded that go beyond compensation for actual injury are punitive-in-fact. *See, e.g., United States v. Halper*, 490 U.S. 435, 448 (1989), *overruled on other grounds by Hudson v. United States*,

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has repeatedly "admonished" that such civil punishment "pose[s] an acute danger of arbitrary deprivation of property," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)), and it has emphasized that "'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment.'" *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)). The Ninth Circuit's approach, however, contravenes these fundamental principles.

By subjecting a defendant to potentially enormous punishment even if the defendant reasonably and in good faith adheres to the statute's express terms, complies with the FTC's formally promulgated notice, and seeks the advice of counsel, the Ninth Circuit's interpretation deprives defendants of all objective referents to guide their conduct, creating enormous vagueness problems and inviting arbitrary and discriminatory enforcement. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915) ($6,300 civil penalty violated due process where defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief" *even assuming* that defendant "should have

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522 U.S. 93, 101 (1997) ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."); *Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986) ("[S]tatutory damages serve two purposes – compensatory and punitive."). Accordingly, these damages implicate the same due process concerns. *See Halper*, 490 U.S. at 448 ("'[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law.'") (quoting *Hicks v. Feiock*, 485 U.S. 624, 631 (1988)).

known that the Supreme Court of the State . . . might hold the [conduct] unreasonable"); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."). *See also Amicus* Br. of Ford Motor Co. 4-10.

The Ninth Circuit's interpretation would permit massive punishment based merely upon the after-the fact determination that the defendant had acted pursuant to legal interpretations that are "creative but unlikely," not "tenable," "implausible," the product of "creative lawyering," "indefensible," or "unreasonab[ly] . . . erroneous." *Reynolds*, 435 F.3d at 1099. But such amorphous characterizations are not standards at all, and "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). The Ninth Circuit's interpretation would render the FCRA just as unconstitutionally vague as the Pennsylvania statute at issue in *Giaccio*, which this Court struck down because it had been judicially interpreted to authorize juries to impose, and courts to set, costs of prosecutions on an acquitted defendant "if they [found] that his conduct, though not unlawful, [was] 'reprehensible in some respect,' 'improper,' outrageous to 'morality and justice,' or that his conduct was 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs' or that though acquitted 'his innocence may have been doubtful.'" *Id.* at 403-04 (citations omitted).

Indeed, because the FCRA is apparently clear on its face, allowing the imposition of statutory or punitive damages based on the Ninth Circuit's retroactive application of its new interpretation to pending cases would represent a particularly

egregious deprivation of due process. *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (there is an even "potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation"); *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 281 (1994) ("The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question.").

Consequently, this Court should reject the Ninth Circuit's interpretation of the FCRA in order to avoid, rather than create, constitutional conflicts. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.").

5. An application of these principles compels a reversal of the Ninth Circuit's decision. The court's expanded definition of "adverse action" to include charging anything less than the best possible rate is found nowhere in the text of the statute or its legislative history. *See* GEICO Pet. 26-28. But even if the federal courts are to infer such a requirement, certainly the petitioners are not "willfully" liable for failing to anticipate that ruling.

Moreover, when an insurer (such as Farmers) sends a notice to a broader group of customers, that insurer may not be held "willfully" liable for failing to predict judicially-created content requirements above and beyond the discrete list explicitly set forth in the statute (15 U.S.C. § 1681m(a)(1)-(3)) and in the FTC's sample notice (15 C.F.R. pt. 601, App. C).

II. Good Faith Reliance On The Advice Of Counsel Is A Defense To A Charge Of Willfully Violating The FCRA

Farmers has cited its reliance on counsel in formulating its FCRA notice as a defense to plaintiffs' claims that Farmers willfully violated the statute. The district courts, however, have struggled with the continued viability of this defense in light of the Ninth Circuit's ruling in *Reynolds*. In Farmers' case, the first two decisions the district court rendered after the initial *Reynolds* opinions rejected this defense outright. Although the district court subsequently permitted Farmers to assert this defense (following the Ninth Circuit's third and final decision now under review), it warned that "[t]he new opinion in *Reynolds* . . . leaves open the possibility, *albeit by a small margin*, that an insurer might be able to establish it did not act willfully in formulating an unlawful adverse action notice, if the formulation of the notice was based on advice of counsel." *Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 8 (D. Or. Feb. 28, 2006) (emphasis added).[8]

Good faith reliance on the advice of counsel should defeat a finding of willfulness. Past precedents of this Court hold that civil defendants may not be held liable for "willful" or "reckless" noncompliance if the defendant sought and followed counsel's advice. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 129-30 (1985). The Ninth Circuit's decision in *Reynolds* improperly negates this presumption and holds that advice of counsel is no longer sufficient to rebut willfulness. The court further clouded the continuing viability of an advice of counsel defense by explaining that

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[8] Given the impact of *Reynolds* and the similarity of the legal issues presented in the cases now under review, the court stayed the *Ashby* action pending this Court's disposition of this appeal. *Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 3-4 (D. Or. Oct. 30, 2006).

evidence of counsel's advice *may* be used to rebut "willfulness" only in "*some*" – but presumably not all – cases. *Reynolds*, 435 F.3d at 1099.

The court's proffered basis for refusing to hold that reliance on counsel negated "willfulness" was its concern that such a rule would "create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* In so ruling, the Ninth Circuit improperly shifted the focus from the *defendant's* actions to the reasonableness of *counsel's* advice. *See id.* ("Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation."). The panel expressed its concern that allowing this defense to rebut "willfulness" would promote "creative lawyering." *Id.* It held that petitioners' interpretation of an issue of "first impression" – that an initial insurance charge to a new customer does not constitute an "increase in any charge for" insurance and thus does not represent an "adverse action" – was "implausible" and that reliance on counsel "[was] not dispositive" in such a circumstance. *Id.* at 1090, 1099. The panel then suggested that in "some" cases in which this defense is appropriate, "the testimony of the company's executives and counsel" is necessary to establish it. *Id.* at 1099.

The lower courts have been constrained by these sweeping statements from even allowing defendants (such as Farmers) to assert an advice of counsel defense. In fact, the same district court that decided the cases under review here warned that this defense survives *Reynolds* only "by a small margin . . . ." *Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 8 (D. Or. Feb. 28, 2006). This defense should not only be *permissible* in all cases, it should continue to serve as presumptive evidence of non-willfulness.

As a preliminary matter, this Court has already rejected a "more expansive" definition of willfulness that would hinge

on the "reasonableness" of the legal advice rendered, because this would "permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect [legal] assumption . . . ." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988).[9]

Further, this Court's prior decision in *Thurston* demonstrates that, as a matter of law, good faith reliance on the advice of counsel negates a finding of "willfulness." In that case, the Court adopted the "reckless disregard" standard of willfulness based on the legislative history of the ADEA. *Thurston*, 469 U.S. at 126. The Court held that the defendants' conduct was not "willful" under even a "reckless disregard" standard:

> TWA certainly did not "know" that its conduct violated the Act. Nor can it fairly be said that TWA adopted its transfer policy in "reckless disregard" of the Act's requirements. The record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA.

Id. at 129. The Court explained that after the amendments to the ADEA, "TWA officials met with their lawyers to determine whether the mandatory retirement policy violated the Act." *Id.* Although the defendants' statutory defense was "meritless" and they had "overlooked" a central legal issue, "[t]here simply [was] no evidence that TWA acted in 'reckless disregard' of the requirements of the ADEA." *Id.* at 124, 130.

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[9] Notably, the stakes here are raised considerably from the comparatively minor effect of a "willful" violation of the provision at issue in *McLaughlin* (an increase in the statute of limitations from two years to three years, *id.* at 129) to the large aggregated statutory and punitive damages that are available, even in the absence of actual injury, upon proof of a "willful" violation of the FCRA notice provisions at issue here.

In the complex regulatory environment governing American business, there will always be open questions as to the precise reach of a particular statute. Companies must be able to rely on qualified counsel to guide their actions – and not be put in peril of extraordinary damages because of *post hoc* determinations by federal courts in litigation. If the company and its counsel misconstrue the statute, the company may be liable under a negligence standard; but in no way can it be said to have "willfully" transgressed the statutory requirements. To the contrary, good faith reliance on the advice of counsel is powerful, if not dispositive, evidence that the company recognized that it is subject to regulatory requirements and has made a good faith effort to conform its conduct and policies to these requirements. As a result, a "willfulness" finding is inappropriate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE J. BOUTROUS, JR.
Counsel of Record
GAIL E. LEES
MARK A. PERRY
WILLIAM E. THOMSON
CHRISTOPHER CHORBA
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

BARNES H. ELLIS
JAMES N. WESTWOOD
TIMOTHY W. SNIDER
STOEL RIVES LLP
900 SW Fifth Avenue
Suite 2600
Portland, OR 97204
(503) 224-3380

Counsel for Amici Curiae

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Nos. 06-84, 06-100

In The Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,

Petitioners

v.

CHARLES BURR, ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL.,

Petitioners

v.

AJENE EDO

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICA'S COMMUNITY BANKERS, AND CONSUMER BANKERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

L. RICHARD FISCHER
BETH S. BRINKMANN*
SETH M. GALANTER
NATHAN D. TAYLOR
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544
*Counsel of Record

NOVEMBER 13, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Amici Curiae will address the following questions:

1. Whether the Ninth Circuit erred in holding that a defendant can be found liable for "willfully" violating the Fair Credit Reporting Act (FCRA), and thus be subject to punitive and statutory damages under 15 U.S.C. § 1681n, upon a finding of reckless disregard of the FCRA's requirements, which is contrary to the holdings of other circuits that "willfully" requires actual knowledge on the part of the defendant that the conduct violated the FCRA.

2. Whether the Ninth Circuit improperly expanded the FCRA by holding that an "adverse action" occurs within the meaning of Section 615 of the FCRA, 15 U.S.C. § 1681m, thereby triggering the requirement to provide notice to an insurance consumer, whenever such a consumer does not get the best insurance coverage at the lowest rate even when the consumer's credit information had no impact (or had a favorable impact) on the rates and terms of the insurance.

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BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICA'S COMMUNITY BANKERS, AND CONSUMER BANKERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Financial Services Roundtable, the Chamber of Commerce of the United States of America, the Business Roundtable, the Mortgage Bankers Association, the American Bankers Association, the American Financial Services Association, America's Community Bankers, and the Consumer Bankers Association respectfully submit this brief as *amici curiae* in support of petitioners in these two cases.[1]

INTERESTS OF *AMICI CURIAE*

Amici curiae are a coalition of prominent national financial services and business organizations whose members include various companies that are authorized under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, to obtain and use consumer reports for various purposes. Those purposes include issuance of insurance, extension of credit, and employment and rental

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[1] Letters from petitioners and respondents indicating that they consent to the filing of *amicus curiae* briefs have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part. Counsel for *amici curiae* provided legal services to petitioners in No. 06-100 regarding this matter at other stages. No person or entity other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

decisions. Such companies are charged under the FCRA with providing notice to a consumer when they take an "adverse action" against the consumer based on a consumer report.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size, in every industrial sector and from every region of the country. One of its principal functions is to advocate the interests of the business community by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

The Business Roundtable is an association of chief executive officers of leading American companies with more than $4.5 trillion in annual revenues and more than ten million employees. Its member companies comprise nearly one-third of the total value of the United States stock market, and represent over forty percent of all corporate income taxes paid to the United States government. Collectively, its member companies returned more than $112 billion in dividends to shareholders and the American economy in 2005. The Business Roundtable is committed to advocating public policies which ensure vigorous economic growth and a productive workforce in America.

The Mortgage Bankers Association (MBA) is a nonprofit corporation headquartered in Washington, D.C. The MBA represents the real estate finance industry, an

industry that employs more than 500,000 people in virtually every community in the country. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

The American Bankers Association (ABA) is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty States and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States.

Founded in 1916, the American Financial Services Association (AFSA) is the trade association for a wide variety of market-funded providers of financial services to consumers and small businesses. AFSA members are important sources of credit to the American consumer, providing approximately over 20 percent of all consumer credit.

America's Community Bankers (ACB) is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. ACB members, whose aggregate assets are more than $1.5 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

The Consumer Bankers Association (CBA) is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity, and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry.

The CBA represents over 750 federally-insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The substantive and remedial provisions of the Fair Credit Reporting Act (FCRA) govern large sectors of the American economy. The FCRA regulates when consumer reports can be obtained and how consumer reports can be used. The purposes for which a consumer report can be used include not only extensions of credit and underwriting insurance, but also decisions regarding employment, eligibility for a license, and any "legitimate business need for the information * * * in connection with a business transaction that is initiated by the consumer." 15 U.S.C. § 1681b(a)(3)(A)-(F).

The FCRA applies to any person who uses information contained in a consumer report to make such decisions. *See, e.g.*, 15 U.S.C. § 1681m(a). Thus, the FCRA regulates companies regularly involved in finance, such as banks and insurance companies, and also companies involved in a wide range of non-finance related business, such as department stores, landlords, employers, cell phone companies, and even cities and towns.

I.

The interpretation by the Ninth Circuit of the FCRA's "willfully" requirement to trigger uncapped punitive damages and statutory damages not based on actual injury to plaintiffs is erroneous and would have a significant detrimental impact on businesses.

A. The FCRA's punitive and statutory damages are not imposed according to any actual damages that a plaintiff may sustain and, accordingly, are penal in nature. Thus, the "willfully" requirement that triggers them must be strictly construed. The "willfully" requirement also is a necessary finding to trigger the Act's criminal provisions. The rule of lenity therefore applies to require a showing of specific intent to violate a known legal duty on the part of defendants before they can be held liable for "willfully" violating the FCRA. The employment case law cited by respondents is not to the contrary because it involved different statutory schemes that did not provide uncapped punitive damages or statutory damages unrelated to proof of actual injury.

B. Interpretation of "willfully," for purposes of the FCRA, to require a showing of specific intent to violate a known legal duty also is warranted in order to avoid doubt about the constitutionality of the federal statute. Significant doubt about the constitutionality of the FCRA's punitive and statutory damages provision arises under the recklessness standard because of the due process limits on excessive or arbitrary awards.

This Court's earliest cases involving violation of the Due Process Clause's substantive limit on private monetary awards arose where statutes fixed damage awards that had no relationship to any actual damages incurred. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915). Building on those cases, the Court has held that the Due Process Clause prohibits "grossly excessive or arbitrary" punitive damages awards. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

When dealing with violations of a technical statute like the FCRA involving reporting of credit, only instances of deliberate lawbreaking could even colorably result in a constitutionally permissible punitive damage award.

Indeed, a prominent factor relevant to the determination of whether a particular award is constitutionally excessive is "the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419. Violations of the FCRA's requirements occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particularly vulnerable persons. Thus, a finding of an unintended, reckless violation of the FCRA, in particular, falls far short of the sort of reprehensible conduct that could support punitive damages. The need for reading the FCRA to require a particularly culpable state of mind is even greater in this situation because statutory and punitive damage awards under the FCRA will generally fail to comply with another significant measure of the constitutionality of such damages: the ratio of those damages to actual damages. *Id.* at 425.

C. A significant litigation risk to defendants sued under the FCRA is caused by the aggregation in class actions of individual claims totaling hundreds of millions (if not billions) of dollars in statutory or punitive damages. Allegations of "willfully" violating the FCRA based on a mere recklessness standard may increase even more that risk because there is a greater likelihood in such cases that a large class will be brought and certified as a damages class action under Federal Rule of Civil Procedure 23(b)(3). That is because courts hold that the FCRA permits plaintiffs in a class to avoid the need to establish any actual damages if they allege willful FCRA violations since the class can seek only statutory damages unrelated to actual individual harm. A recklessness standard such as that adopted by the Ninth Circuit makes it easier for plaintiffs' counsel to make such an allegation of "willfully" consistent with Federal Rule of Civil Procedure 11.

At the same time, the Ninth Circuit's mere recklessness standard for "willfully" violating the FCRA

adversely affects the ability of a defendant to estimate accurately the risk of litigation. A business that determines it can prove that it acted in good faith (*i.e.*, non-willfully), and thus would be willing to litigate to conclusion a case making allegations of willfulness, would be under increased pressure to settle a case that relies on some amorphous standard of recklessness to determine the plaintiffs' eligibility for potentially significant punitive and statutory damages unrelated to any actual harm.

The driving force for such class actions is not compensation for individual harm, but professional plaintiffs and attorneys intent on extracting monetary damages from companies (and their shareholders) for themselves and a class of uninjured consumers. The defendant companies, however, provide valuable services and may have engaged in unintended technical violations of a complex regulatory statute. Such class action lawsuits could, in the aggregate, cost American businesses billions of dollars that are not tied to any actual injury to plaintiffs.

II.

The Ninth Circuit interpreted the term "adverse action" for purposes of the FCRA insurance provisions in a manner that is contrary to the plain language of the statute. The court's application of that term to the issuance of any insurance coverage that is not the best insurance coverage at the lowest possible rate is unprecedented. It would have unreasonably broad practical implications not intended by Congress.

A. The FCRA's adverse action insurance provision is intended to ensure that an insurer gives notice to a consumer when it charges a consumer an increased rate because of credit information in a consumer report. The plain language of the statute specifies that an adverse action occurs only if consumer report information is used,

in whole or in part, to "increase [the] charge for" insurance coverage for that consumer. 15 U.S.C. § 1681a(k)(1)(B)(i).

The FCRA is not concerned about comparisons of a consumer's rate with that of the hypothetical consumer who gets the best coverage at the lowest possible rate. Thus, if a consumer receives the same rate that she would have received if her consumer report information had not been considered (or, of course, a better rate), an adverse action has not occurred within the meaning of the statutory provision. That is because the consumer report information did not result in an increase in the charge for the insurance coverage for that consumer.

The court of appeals disregarded critical aspects of the FCRA's text and structure when it attempted to shoehorn into the "adverse action" insurance definition all rates other than the best coverage at the lowest rate. First, the FCRA, as amended in 2003, requires that consumer reporting agencies provide consumers with a free consumer report once each year upon request. *See* 15 U.S.C. § 1681j(a)(1)(A). But under the Ninth Circuit's view, such a provision would have been nearly meaningless because all insurance consumers except those with the very best coverage with the lowest rates already would be receiving such reports with annual renewals under 15 U.S.C. § 1681j(c), which provides that each adverse action entitles the consumer to a free consumer report from the consumer reporting agency.

Second, the Ninth Circuit ignored Congress's amendment of the FCRA in 2003 to require an alternate risk-based pricing notice in the credit area, but not the insurance area, in certain instances when a business provides a consumer with credit on "terms that are materially less favorable." 15 U.S.C. § 1681m(h)(1), (5). Congress did not treat that issue as involving an "adverse action." The Ninth Circuit's interpretation below of the term "adverse action," however, would impose on the insurance

industry such a risk-based pricing notice as a matter of judicial fiat.

B. Only a small number of consumers receive the "best" rate for insurance when the rate is based in part on information in consumer reports. The Ninth Circuit ruling thus would result in the issuance of tens of millions of pointless notices to consumers each year who receive good rates based on good consumer reports but do not receive the absolute best coverage at the lowest possible rate. That deluge of additional notices would not only burden significantly insurance companies, but it also would provide consumers with little, if any, appreciable benefit. Such a volume of notices could, in fact, harm consumers by overloading them with information and numbing them to important notices.

ARGUMENT

I. THE FCRA DEMANDS A SHOWING THAT A DEFENDANT SPECIFICALLY INTENDED TO VIOLATE THE STATUTE IN ORDER TO ESTABLISH THAT IT "WILLFULLY" DID SO AND IS THEREFORE SUBJECT TO PUNITIVE AND STATUTORY DAMAGES

In order for a plaintiff to recover punitive damages (which are not capped) and statutory damages (of at least $100 and up to $1,000 per consumer) for violating the FCRA, the plaintiff must establish that the defendant "willfully" failed to comply with the relevant FCRA requirement. 15 U.S.C. § 1681n(a). In the context of the FCRA, "willfully" must be interpreted to require proof that a defendant specifically intended to violate a known legal duty under the FCRA in order to recover punitive or statutory damages. *See, e.g., United States v. Pomponio*, 429 U.S. 10, 12 (1976) ("willfulness in this context simply means a voluntary, intentional violation of a known legal duty").

The Ninth Circuit's misreading of the term "willfully" to include mere recklessness (Pet. App. 128a-129a) is erroneous.[2] Three contextual features of the FCRA are particularly significant in reaching this result: the penal nature of the remedies under the FCRA that are triggered by a "willfully" showing; the need to construe the FCRA's damages provision to avoid doubt about its constitutionality; and the unduly harsh consequences of the Ninth Circuit's lesser standard, particularly in class actions.

A. The Rule Of Lenity Requires That The FCRA's "Willfully" Requirement Be Met By A Showing Of Specific Intent Because It Triggers Imposition Of Punitive And Statutory Damages, And Supports Criminal Sanctions Elsewhere In The Statute

1. The FCRA is a technical statute that, even decades after its enactment, is still the subject of much uncertainty on the part of businesses who must comply with its varied notice requirements. This fact is reflected in Congress's three-tiered approach to liability for damages.

When a defendant violates the FCRA, but does not do so willfully or even negligently, Congress did not authorize any private plaintiff enforcement. *See Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 417 (4th Cir. 2001) ("FCRA does not impose strict liability"). Congress thereby recognized that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff.

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[2] References to "Pet. App." are to the Petition Appendix filed by petitioners in No. 06-84.

At the same time, the FCRA ensures that actual damages are available to an individual who has been injured as a result of a *negligent* violation of certain of the FCRA's requirements. 15 U.S.C. § 1681o(a)(1).

Congress set the bar much higher for recovery of money damages in excess of actual damages caused by the FCRA violation. A finding that a defendant "willfully" violated the FCRA is required to allow an award of punitive or statutory damages in suits for all violations of FCRA that can be privately enforced. 15 U.S.C. § 1681n(a). It also is a necessary finding to trigger criminal conviction elsewhere in the statute. *Id.* § 1681q (sentence of up to two years imprisonment for knowingly and willfully obtaining consumer reporting agency information under false pretenses); *id.* § 1681r (sentence of up to two years imprisonment for consumer reporting agency's employee knowingly and willfully providing information to unauthorized recipient).

2. The term "willfully" is, of course, "a word of many meanings," and the correct interpretation of the term "is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998) (quoting in part *Spies v. United States*, 317 U.S. 492, 497 (1943)). *See* Br. in Opp. 18 (acknowledging relevance of context). The ambiguity of the term "willfully" in the context of the FCRA means that it must be read narrowly not to trigger punishment in order to comply with the rule of lenity. *See Ratzlaf v. United States*, 510 U.S. 135, 148 (1994) ("were we to find [the statute's] 'willfulness' requirement ambiguous * * * , we would resolve any doubt in favor of the defendant"). When Congress uses the term "willfully" in "highly technical statutes" like the FCRA that present "the danger of ensnaring individuals engaged in apparently innocent conduct," a plaintiff must show that the defendant acted with specific intent, knowing "that his conduct was unlawful" in order to hold it liable. *Bryan v. United States*, 524 U.S. at 194-195.

The rule of lenity is not limited to criminal sanctions but applies to statutes in which the civil remedies can be described as "penal." *See* 3 Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 59.1, at 114-116 (6th ed. 2001). In *Steam-Engine Co. v. Hubbard*, 101 U.S. 188 (1879), for example, a statute required that a corporate president file an annual report and provided that if he "intentionally neglects or refuses to comply with that requirement," he would be personally liable for any debts incurred by the corporation contracted during the period of neglect or refusal. *Id.* at 189. This Court held that the private civil action for damages created by the statute "should be strictly construed" because the statute "is penal." *Id.* at 191.

The rule of lenity applies to statutes that authorize punitive damages because those damages are widely recognized to be penal. *See Sutherland*, *supra*, § 59.2, at 119, 121 ("provisions for exemplary damages" are "penal" because "their effects are punitive"). Punitive damages "serve the same purposes as criminal penalties," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at 417, and "have been described as 'quasi-criminal,'" *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citation omitted). "[B]y definition [they] are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981).

Statutory damages that allow an award of monetary damages against a defendant without regard to the existence or amount of actual injuries sustained by a plaintiff also call for application of the rule of lenity. Such statutes are penal because they "compel obedience beyond mere redress to an individual for injuries received." *Sutherland*, *supra*, § 59.1, at 116. Courts traditionally have held that a civil action providing for such statutory

damages is penal, and thus must be strictly construed. *See* 23 *American & English Encyclopaedia of Law* 378-379 (1st ed. 1893) (rule of strict construction "applies not only to statutes relating to criminal offenses, but also to all statutes which impose, as punishment, any penalties, pecuniary or otherwise, * * * or provide for the recovery of damages beyond just compensation to the party injured, whether such penalties, forfeitures, or damages are to be enforced and recovered at the suit of the state or of a private individual."); *Marshall v. Wabash Ry. Co.*, 46 F. 269, 270-271 (C.C.S.D. Oh. 1891) ("where the plaintiff is not required to offer any evidence proving damages, and the defendant is not permitted to offer any evidence disproving damages, and the recovery is to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely, and not penal"); *Wood, Walker & Co. v. Evans*, 461 F.2d 852, 855 (10th Cir. 1972) (statutes where "the amount of the damages is fixed on a somewhat liquidated measure without regard to injury suffered" are "strictly construed"). "By this is meant no more than * * * when there is reasonable doubt as to [a word's] true meaning, the Court will not give them such interpretation as to impose the penalty." *Hines & Battle v. Wilmington & W. Ry. Co.*, 95 N.C. 434, 437 (1886).

In *Brown v. Kildea*, 58 Wash. 184 (1910), the court was faced with statutory damages akin to those at issue here. The court held that a statute authorizing a private cause of action against a corporate official for a statutory damage award of not less than $100 nor more than $1,000 should be "strictly construed" because it "subjects one person to the payment of a sum of money to another, without reference to any actual injury and without requiring him either to allege or prove an actual injury." *Id.* at 186-187; *see also Cleveland, C. C. & S. L. Ry. Co. v. Wells*, 62 N.E. 332, 334 (Ohio 1901) ("the right to recover not less than one hundred and fifty dollars, although

double the amount of overcharge might not be one dollar, and the right to recover exemplary damages, are severely penal privileges" and thus those provisions "are to be strictly construed"); *Hines*, 95 N.C. at 438 (same for statute authorizing private suit to recover statutory damages of $200 for discriminatory rates). Here, of course, the statutory damages provision of the FCRA allows damages "of not less than $100 and not more than $1,000" regardless of any injury sustained by the plaintiffs and respondents seek such damages for each class action consumer. 15 U.S.C. § 1681n(a)(1)(A).

The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions require the government to prove that a person acted "willfully" in order to establish criminal liability. *See* 15 U.S.C. §§ 1681q, 1681r. The fact that the criminal provisions are not applicable in this particular case is irrelevant. There is nothing in the FCRA that suggests, much less demonstrates, that Congress intended the same word to have different meanings in different portions of the same statute. *See Ratzlaf*, 510 U.S. at 143 ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); *see also Crandon v. United States*, 494 U.S. 152, 168 (1990) (applying the rule of lenity in a civil action premised on a criminal statute).

3. Respondents' attempt to seek refuge in employment law cases that interpret "willful" to mean reckless must be rejected. *See* Br. in Opp. 14 (citing, *inter alia*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). Under the Age Discrimination in Employment Act (ADEA) provision at issue in *Thurston* and *Hazen Paper*, a finding of willfulness permitted a court to award an amount equal to the amount of lost wages as liquidated damages, but this Court has expressly held that such a

double damages remedy is "compensation, not a penalty or punishment" and serves as remuneration for "damages too obscure and difficult of proof." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-584 (1942) (interpreting similar provision in Fair Labor Standards Act). That remedy also has been viewed as a substitute for prejudgment interest, which is not otherwise available under the ADEA. *See Powers v. Grinnell Corp.*, 915 F.2d 34, 39-41 (1st Cir. 1990) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-716 (1945)). Thus, there was no cause for the Court to apply the rule of lenity in those cases.[3]

Likewise, the third employment case did not involve either uncapped punitive damages or statutory damages without proof of actual injury and thus did not implicate the rule of lenity. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (willfulness finding based on a recklessness standard extended the statute of limitations for bringing suit from two years to three years).

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[3] The Court's indication in *Thurston* that the double back-pay provision was "punitive in nature," 469 U.S. at 125, relied on the statement of a Senate sponsor of the ADEA, but that legislative statement was that the double back-pay provision would "furnish an effective deterrent to willful violations," *Ibid.* (quoting 113 Cong. Rec. 2199 (1967) (Sen. Javitts)), and remedial provisions can provide effective deterrence so that statement does not necessarily support the Court's *dictum*. Additional legislative history concluded that the provision was not punitive. *See* H. Conf. Rep. No. 95-950, at 13-14 (1978) (explaining that the "ADEA as amended by this act does not provide remedies of a punitive nature" and quoting *Missel*, 316 U.S. at 583-584).

B. A Specific Intent Standard Avoids The Substantial Constitutional Doubt Raised By A Lesser Standard

A federal statute must be read to avoid doubt about its constitutionality. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005).[4]

This constitutional avoidance doctrine supports interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to violate a known FCRA requirement. The contrary interpretation of the term urged by respondents, and adopted by the Ninth Circuit, that establishes a mere recklessness standard raises substantial questions about the constitutionality of any resultant statutory or punitive damages awards because of the Constitution's substantive limits.

This Court's earliest cases involving violation of the Due Process Clause's substantive limit on private

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[4] The Seventh Circuit's recent refusal, in deciding whether a class should be certified, to consider whether subjecting a defendant to "billions of dollars for purely technical violations of the FCRA" could violate the Constitution, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006), conflicts with the reality that defendants confronted with a certified FCRA class seeking billions of dollars in damages cannot reasonably rely on the possibility that constitutional limits will be imposed *after* damages are awarded, as the court there suggested. Such circumstances likely would unfairly induce settlement to avoid potential ruinous liability. In any event, *Murray* does not suggest that constitutional doubt can be ignored in determining the scope of the statute.

monetary awards arose where, as here, a statute fixed a damages award that had no relationship to any actual damages incurred. Thus in *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915), this Court held that a provision authorizing statutory damages of $100 per day for refusing a customer phone service violated due process when the company's action was in good faith, impartially applied, consistent with longstanding practice, and done in the absence of any state ruling that the conduct was unreasonable. Under these circumstances, this Court held that "inflict[ing] upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." *Id.* at 491; *see also Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (statutory damages of $500 for overcharging a customer $3 violated due process because the damages were "grossly out of proportion to the possible actual damages").

Building on those early cases, the Court has held that the Due Process Clause prohibits "grossly excessive or arbitrary" punitive damages awards. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). When dealing with violations of such a technical statute like the FCRA involving reporting of credit, only instances of deliberate lawbreaking could even colorably result in a constitutionally permissible punitive damage award. *Cf. Gore*, 517 U.S. at 576; *see id.* at 580 ("the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists"); *Southwestern Tel. & Tel. Co.*, 238 U.S. at 489-490 (relying on defendant's good faith to find statutory damages unconstitutionally excessive).

Indeed, a prominent factor relevant to the determination of whether a particular award is constitutionally excessive is "the degree of reprehensibility of the defendant's

conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 575). In assessing reprehensibility, a court must consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419.

Violations of the FCRA's requirements occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particularly vulnerable persons. Such violations will thus rarely be sufficiently "reprehensible" to permit any award of punitive damages under the Constitution, under any standard of willfulness. A finding of an unintended, reckless violation of the FCRA, in particular, falls far short of the sort of reprehensible conduct that could support punitive damages. To reduce the likelihood of unconstitutional damage awards, this Court must read the statute to require proof of a particularly culpable state of mind, *i.e.*, at least a specific intent to violate a known legal duty.

The need for reading the FCRA to require a particularly culpable state of mind is even greater in this situation because statutory and punitive damage awards under the FCRA will generally fail to comply with another significant measure of the constitutionality of such damages: the ratio of those damages to actual damages. *State Farm*, 538 U.S. at 425. The ratio is extremely large in virtually all FCRA cases because the actual damages to individuals in such cases, especially those involving failure to provide notice such as here, is almost always quite low. This is true even when, as in these cases, plaintiffs seek only statutory damages. In the cases now before the Court, the actual damages likely would be $0 because receiving the notice would not have altered the results, yet

respondents seek $1,000 damages for each of an unquantified number of individuals in the putative class. The only way such damages could survive a constitutional challenge, if at all, is if the plaintiffs are required to prove that defendants possessed the specific intent to violate a known legal duty under the statute. There certainly is no evidence that Congress intended to authorize such damages, unrelated to actual harm, based merely on unintended, reckless violations. In the absence of "firm evidence" to the contrary, it should not be assumed that "Congress intended to press ahead into dangerous constitutional thickets" and the term "willfully" thus should be read in a manner that avoids, or at least reduces, such potentially unconstitutional results. *Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989).

C. Awards Of Uncapped Punitive Damages And Statutory Damages Based On Mere Recklessness Would Result In FCRA Class Actions For Billions Of Dollars Not Based On Actual Harm

A significant litigation risk to defendants sued under the FCRA is caused by the aggregation in class actions of individual claims totaling hundreds of millions (if not billions) of dollars in statutory or punitive damages.

Respondents' complaints in the two actions under review are typical of FCRA cases that plaintiffs seek to litigate as class actions. Plaintiffs made no claim that petitioners' actions were negligent or that the named plaintiffs personally suffered any actual damages. Instead, their complaints, at the time they were dismissed by the district court, alleged only willful misconduct and sought statutory and punitive damages on behalf of a class. On remand from the Ninth Circuit, plaintiffs amended their complaints to strike their claims for punitive damages, and now seek $1,000 statutory damages for each member

of the putative class. The allegations in the two other FCRA cases in which *certiorari* petitions are pending likewise seek only non-compensatory damages for the putative classes and do not bother to allege any actual harm sustained by the named plaintiffs.

Such allegations of willful FCRA violations based on a mere recklessness standard may increase even more the risk of enormous damage recoveries. There is a greater likelihood that such a case will be brought and certified as a damages class action under Federal Rule of Civil Procedure 23(b)(3). That is because courts hold that the FCRA permits plaintiffs in a class to avoid the need to establish any actual damages if they allege the defendant willfully violated the FCRA. *See, e.g., In re Progressive Ins. Corp. Underwriting and Rating Practices Litigation*, No. 1:03-cv-01519-MP-AK, slip op. (N.D. Fla. June 23, 2006) (certifying a FCRA class, for settlement purposes, of "several million" consumers); *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450 (W.D. Okla. Apr. 13, 2006) (certifying FCRA class of over one million insureds); *Cavin v. Home Loan Ctr., Inc.*, 236 F.R.D. 387 (N.D. Ill. 2006) (FCRA class of approximately 49,000 members). A recklessness standard for willfulness, such as that adopted by the Ninth Circuit, makes it easier for plaintiffs' counsel to make such an allegation consistent with Federal Rule of Civil Procedure 11.

At the same time, the Ninth Circuit's mere recklessness standard for willful violations adversely affects the ability of a defendant to estimate accurately the risk of litigation. A business that determines it can prove that it acted in good faith (*i.e.*, non-willfully), and thus would be willing to litigate to conclusion a case making allegations of willfulness, would be under increased pressure to settle a case that relies on some amorphous standard of recklessness to determine the plaintiffs' eligibility for potentially significant punitive and statutory damages unrelated to any actual harm.

Under a recklessness standard, such a class action "create[s] a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements." *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003); *see* Fed. R. Civ. P. 23 advisory committee's note (1998 Amendments) (money class actions may force many defendants "to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.) (noting that "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements' "), *cert. denied*, 516 U.S. 867 (1995).

The driving force for such class actions is not compensation for individual harm, but professional plaintiffs and attorneys intent on extracting monetary damages from companies (and their shareholders) for themselves and a class of uninjured consumers. The defendant companies, however, provide valuable services and may have engaged in unintended technical violations of a complex regulatory statute. One example of this phenomenon is Mr. and Mrs. Murray, who have sought to be class representatives in dozens of FCRA class actions and, as one district court noted, "greet the arrival of what most people would consider junk mail (*i.e.*, unsolicited offers of credit) with joy and eagerly show their mail to lawyers * * * pursuant to a pre-existing agreement in the hope of finding an offer that presents a colorable FCRA claim." *Murray v. Cingular Wireless II, LLC*, 2005 U.S. Dist. LEXIS 39542, at *7-*8 (N.D. Ill. Dec. 22, 2005); *see also Murray v. Cingular Wireless II, LLC*, 2005 U.S. Dist. LEXIS 39561, at *1-*2 (N.D. Ill. Nov. 2, 2005). The "willfully" requirement should not be read as respondents would have it, to make it easier for the Murrays and their lawyers to obtain class certification and obtain a windfall

of non-compensatory damages from a broad range of American businesses.

Counsel who bring such actions are well aware that such allegations increase substantially the pressure for settlement regardless of the merits of the case. In a case described by respondents as involving an "identical" claim (Br. in Opp. 7 n.2), insurance companies settled a class action suit for $280 per person in statutory damages for a class of more than 67,000 members. That settlement totaled nearly $20 million in damages without any proof of actual damages sustained by a class member. *See Razilov v. Nationwide Mut. Ins. Co.*, No. CV 01-1466 BR (D. Or. July 6, 2006) (Stipulation of Settlement). Of that settlement, plaintiffs' counsel has requested nearly $6 million in fees. *Razilov v. Nationwide Mut. Ins. Co.*, No. CV 01-1466 BR (D. Or. Oct. 20, 2006) (Fee Petition).

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE FCRA'S "ADVERSE ACTION" INSURANCE PROVISION IS CONTRARY TO THE STATUTORY TEXT AND STRUCTURE AND WOULD HAVE A SUBSTANTIAL NEGATIVE EFFECT ON THE CONDUCT OF AMERICAN BUSINESSES

The FCRA defines the term "adverse action" for purposes of its insurance provisions as "a denial or cancellation of, *an increase in any charge for*, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). *See also* page 26, *infra* (discussing other definitions of "adverse action" in the FCRA). The FCRA requires that an insurance company notify a consumer of such an action taken in connection with an underwriting decision when it is based in part on a consumer report obtained under 15

U.S.C. § 1681b(a)(3)(C) in connection with the underwriting. *See id.* § 1681m(a)(1).

The Ninth Circuit held that the phrase "an increase in any charge" in Section 1681a(k)(1)(B)(i) includes the purchase of insurance where the consumer is charged a rate that is higher than what the consumer would have been charged if his score had been the "top potential score" based on information from his consumer report. Pet. App. 118a. That interpretation would mean that an adverse action occurs whenever a "consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable." *Ibid.* The ruling thus applies to issuance of any insurance coverage that is not the best insurance coverage at the lowest possible rate.

A. The FCRA's Text And Statutory Structure Demonstrate That The "Adverse Action" Insurance Provision Does Not Extend To Every Insurance Customer Who Does Not Receive The Best Coverage At The Lowest Possible Rate

1. The plain language of the FCRA insurance provision specifies that an adverse action occurs only if the information from a consumer report is used, in whole or in part, to "increase [the] charge for" insurance coverage for that consumer. 15 U.S.C. § 1681a(k)(1)(B)(i). The provision is intended to ensure that an insurer gives notice to a consumer when it charges a consumer an increased rate because of credit information in a consumer report.

The FCRA is not concerned about comparisons of a consumer's rate with that of the hypothetical consumer who gets the best coverage at the lowest possible rate. Thus, if a consumer receives the same rate that she would have received if her consumer report information had not been considered (or, of course, a better rate), an adverse action has not occurred within the meaning of the

statutory provision. That is because the consumer report information did not result in an increase in the charge for the insurance coverage for that consumer.

The facts of one of the other FCRA cases currently pending before the Court demonstrate that the Ninth Circuit's contrary interpretation would expand the meaning of the statutory text. In *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, the plaintiff was quoted a price for insurance before she formally applied for automobile insurance. The quote was based only on background information she provided including, for example, the fact that she had received a speeding ticket within the preceding thirty-six months. *See State Farm* Pet. 3. After the plaintiff submitted her formal insurance application, the insurer reviewed her credit history in the consumer report as part of its underwriting process but ultimately issued her insurance policies "at the rates that had been quoted to her without reference to any credit information or other consumer report" information. *Id.* at 3-4. Despite evidence that conclusively demonstrated that the plaintiff received the *same* rate that she would have received if her consumer report information had not been considered, the Ninth Circuit held that the plaintiff had been subjected to an adverse action because she did not get a lower rate.

2. The Ninth Circuit disregarded critical aspects of the FCRA's structure when it attempted to shoehorn into the "adverse action" definition any consideration by a company of a consumer report that does not give a consumer the best possible coverage at the lowest possible rate, regardless of whether consideration of the report made the consumer worse off than if no consideration had been given to the consumer report.

First, each adverse action notice entitles the recipient to a free consumer report from the consumer reporting agency. *See* 15 U.S.C. § 1681j(c). If Congress had intended the FCRA adverse action insurance provision to generate

free consumer reports to nearly all consumers, Congress would not have amended the FCRA in 2003 to require that consumer reporting agencies provide consumers with a free consumer report once each year upon request, *see id.* § 1681j(a)(1)(A), because all insurance consumers except those with the very best coverage with the lowest rates already would be receiving such reports with annual renewals under 15 U.S.C. § 1681j(c), which provides that each adverse action entitles the consumer to a free consumer report from the consumer reporting agency.

Second, the Ninth Circuit ignored Congress's addition in 2003 of certain provisions to govern risk-based pricing of credit, but not of insurance, when a business provides a consumer with credit on "terms that are materially less favorable." 15 U.S.C. § 1681m(h)(1). Section 1681m(h) requires that federal agencies issue regulations to require a business that extends credit to provide an alternate risk-based pricing notice in certain instances.

Congress added the provisions in response to the growing use of consumer reports to determine the terms of the credit extended, and not just whether to extend credit. The FTC informed Congress in hearings preceding the 2003 amendments that extenders of credit "increasingly are using consumer reports to undertake risk-based pricing of products or services. Many creditors * * * no longer merely approve or deny applications, but, rather, they use credit report data to finely calibrate the terms of their offer." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong., 6 (2003) (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n).

Congress was also told that the existing definition of "adverse action" for the FCRA's credit provisions was not triggered by such risk-based pricing because the FCRA specifies that, in the credit context, the term "adverse action" "has the same meaning as in" the Equal Credit Opportunity Act (ECOA). 15 U.S.C. § 1681a(k)(1)(A).[5] The

[5] The FCRA includes different definitions of the term "adverse action" in the different contexts of insurance, credit, employment, government license and benefits transactions, and a "miscellaneous" definition. *See* 15 U.S.C. § 1681a(k). The so-called miscellaneous definition provides that an adverse action is an action that is "made in connection with an application * * * made by, or a transaction * * * initiated by, any consumer" and is "adverse to the interests of the consumer." 15 U.S.C. § 1681a(k)(1)(B)(iv). Congress did not intend the FCRA's "miscellaneous" definition to apply to transactions governed by another "adverse action" definition. The transaction-specific structure of the FCRA adverse action definitions demonstrates that the "miscellaneous" definition was intended to ensure that if a person has a permissible purpose to obtain a consumer report for a non-credit, non-insurance, non-employment, non-license or non-benefit transaction and the person uses such report as the basis for an action adverse to the consumer's interest, the person would be required to provide the consumer with an adverse action notice. The legislative history confirms that Congress intended the miscellaneous definition to apply only when the transaction did not fall within another definition. *See Senate Hearings, supra*, at 53 & n.46 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n); S. Rep. No. 104-185, at 31-32 (1995); H.R. Rep. No. 103-486, at 26 (1994) (explaining that earlier proposed version of the "miscellaneous" definition was intended to cover "a refusal to cash a check, lease real estate, or open a new transaction account based on a consumer report").

The Seventh Circuit, in a conclusory opinion that finds no basis in the statute, erroneously held that the "miscellaneous" definition can apply to credit transactions. *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 982 (7th Cir. 2004). That decision is wrong and, if followed, could significantly expand the effect of the "adverse action" holding because the Ninth Circuit's interpretation here could similarly expand the "miscellaneous" definition. Moreover, if the "miscellaneous" definition applied to credit transactions, the "credit" definition would be rendered superfluous because it would be subsumed by the broader "miscellaneous" definition – a result that Congress could not have intended.

ECOA defines "adverse action" to mean "a denial or revocation of credit," 15 U.S.C. § 1691(d)(6), and its implementing regulations make clear that if a consumer applies for credit at a specific rate but the lender makes a counteroffer at a different rate, there is no adverse action if the consumer accepts the lender's counteroffer. *See* 12 C.F.R. § 202.2(c); *Senate Hearings*, *supra*, at 53 n.46 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) (consumers "often receive a counter-offer at a higher price. Under the law, if the consumer accepts that counter-offer, there is no adverse action because the FCRA definition [of adverse action for credit] is coupled to the definition under the [ECOA]."). Courts have relied on these implementing regulations to conclude that "a denial of credit coupled with a counteroffer that is accepted by the applicant does not trigger the FCRA's [adverse action] notice requirement because the applicant has suffered no 'adverse action.'" *Harper v. Lindsay Chevrolet Oldsmobile, LLC*, 212 F. Supp. 2d 582, 591 (E.D. Va. 2002).

The Ninth Circuit, through its interpretation of the term "adverse action," has imposed on the insurance industry its own risk-based pricing disclosure requirement. The details of what terms are material will, apparently, be determined through case-by-case adjudication. It is clear that Congress did not intend such a requirement for insurance, however, because it could have easily extended the amendment to apply the risk-based pricing provision that it created in the credit context to such insurance transactions as well, but did not do so.

B. The Ninth Circuit's Ruling Would Require The Issuance Of Millions Of Useless Notices To American Consumers

The Ninth Circuit's interpretation of "adverse action" in this case would force insurance companies, and possibly other persons subject to the FCRA, to issue tens of millions of pointless notices to consumers each year.[6]

Only a small number of consumers receive the best insurance coverage at the lowest possible rate when the rates are based in part on credit information from consumer reports. At many insurance companies that rely in part on such information to set rates, fewer than 15% of insureds receive the best rate available. *See* Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance*, Apps. C & D (2002). But the Ninth Circuit's holding would require insurance companies to provide adverse action notices to nearly all consumers who purchase insurance, *i.e.*, all but the small group who have the best scores and receive the best coverage and rates. Because the majority of consumers nationwide must

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[6] The Ninth Circuit appears to have found that when a consumer is charged an increased rate for insurance and no adverse action notice is provided, the party that makes "the decision as to which of the" affiliated insurance companies will issue the policy will be subject to liability along with the company that issues the policy. Pet. App. 125a. That holding, which finds no statutory basis in the FCRA, could possibly make a bank liable under 15 U.S.C. § 1681s(b), along with a mortgage insurance company, if it selects which mortgage insurance company to underwrite a policy and the rate charged for the mortgage insurance is not the "best" rate and the bank fails to provide an adverse action notice. Similarly, if a consumer wishes to obtain credit-life or credit-disability insurance to protect against default on a credit product obtained from a bank and the bank, based in part on consumer report information, selects the insurance company that will receive the consumer's insurance application, the bank might face liability under 15 U.S.C. § 1681s(b) in the Ninth Circuit if the rate charged for the insurance is not the "best" rate and no adverse action notice is provided.

obtain automobile and/or homeowner's insurance, the Ninth Circuit's holding will require insurance companies to produce and send tens or hundreds of millions of additional adverse action notices each year.

Congress could not have intended such an absurd result. To the contrary, the Federal Trade Commission cautioned Congress to this effect when Congress was addressing revisions to the FCRA. It explained that it was important "to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate." *Senate Hearings*, *supra*, at 529 (testimony of Joel Winston, Associate Director, Financial Practices Division, Bureau of Consumer Protection, Federal Trade Comm'n).

The deluge of additional notices would provide consumers with little, if any, appreciable benefit and might, in fact, harm consumers by overloading them with information and numbing them to important notices. For example, the notices may confuse or mislead consumers who receive insurance at favorable rates because of their good credit histories, but not at the "best" rates. In addition, as more adverse action notices are provided, there is a real risk that the effectiveness of the notices intended by Congress will be diluted substantially. Consumers may begin to treat the notices as boilerplate disclosures that should be ignored. *See Senate Hearings*, *supra*, at 95-96 (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) ("[I]f you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore."); *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (discussing problem of "informational overload"). The flood of additional notices will undercut their statutorily intended function to focus consumers on potential material inaccuracies in their consumer reports.

Typical consumers with good credit histories who obtain insurance at a favorable rate but receive adverse action notices, would spend unnecessary time examining consumer reports for material inaccuracies that do not exist.

CONCLUSION

For the reasons set forth above, the judgments of the Ninth Circuit should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

L. RICHARD FISCHER
BETH S. BRINKMANN*
SETH M. GALANTER
NATHAN D. TAYLOR
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544

Counsel of Record

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Nos. 06-84, 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *ET AL.*,
Petitioners,

v.

CHARLES BURR, *ET AL.*,
Respondents.

GEICO GENERAL INSURANCE COMPANY, *ET AL.*,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF FORD MOTOR COMPANY IN SUPPORT OF PETITIONERS

WALTER DELLINGER
MATTHEW M. SHORS
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

DAVID G. LEITCH
Counsel of Record
JOHN M. THOMAS
Office of the General Counsel
Ford Motor Company
The American Road
Dearborn, Michigan 48126
(313) 322-7453

Counsel for Amicus Curiae

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AJENE EDO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF FORD MOTOR COMPANY IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

Ford Motor Company ("Ford") assembles and distributes

[1] Pursuant to this Court's Rule 37(a), blanket letters of consent from the parties were filed with the Clerk on September 28, 2006 and September 29, 2006. Pursuant to Rule 37.6, Ford states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than Ford made a monetary contribution to the preparation or submission of this brief.

motor vehicles nationwide. One of Ford's wholly-owned subsidiaries, Ford Motor Credit Company ("Ford Credit"), offers a wide variety of automotive financing products to and through automotive dealers nationwide. As a provider of financing products, Ford Credit is subject to litigation based on the occasionally ambiguous terms of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), and has a direct interest in ensuring that it is not subject to statutory or punitive damages for good faith, objectively reasonable interpretations of the provisions of that act. *See, e.g., Carter* v. *Atchley Ford, Inc.*, No. 8:01CV151, 2002 WL 802682 (D. Neb. 2002) (seeking punitive damages under FCRA).

Ford and Ford Credit are also routinely subject to other litigation under state and federal law in which the plaintiff seeks statutory or punitive damages on the basis that they have allegedly acted in conscious or reckless disregard of the plaintiffs' rights, the same standard that the Ninth Circuit adopted in this case for awarding statutory and punitive damages under FCRA. *See, e.g., Buell-Wilson* v. *Ford Motor Co.*, 141 Cal. App. 4th 525 (2006) (punitive damages sought for "conscious disregard" of safety in designing motor vehicle); *In re Ratliff*, 318 B.R. 579, 583 (Bankr. E.D. Okla. 2004) (punitive damages sought for repossessing secured vehicle in "reckless disregard" of federally protected right to automatic bankruptcy stay). In many of these cases, punitive damages are sought, and occasionally awarded, even though Ford or Ford Credit's conduct was objectively reasonable, *i.e.*, reasonable people could conclude that their conduct was lawful. In *Buell-Wilson*, for example, the California courts have upheld an award of punitive damages against Ford based on alleged stability defects in the Ford Explorer even though the National Highway Traffic Safety Administration has repeatedly considered and rejected the theories asserted by the plaintiffs, and even though, prior to the *Buell-Wilson* trial, Ford had never lost an Explorer

rollover case at trial and at least 11 other juries had returned defense verdicts in such cases.

As explained below, due process precludes punishment for objectively reasonable conduct that reasonable people could conclude was lawful. For this reason, it should preclude punishment in this case for an interpretation of FCRA that the district court found was correct or that has been endorsed by the Federal Trade Commission. Ford has a substantial interest in ensuring that this Court's decision takes account of the constitutional limitations that apply, not just in this case, but in all other cases in which punitive damages are sought.

SUMMARY OF ARGUMENT

As the petitions explain, the Ninth Circuit interpreted the term "willful" as used in 15 U.S.C. § 1681n to permit the imposition of punitive damages based solely on "negligence, gross negligence, or a completely good faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law." Geico Pet. *i.; see also* Safeco Pet. 2. So understood, the Ninth Circuit's opinion would permit punitive damages to be awarded under circumstances in which reasonable people could conclude—indeed, like the district court and the Federal Trade Commission, *have* concluded—that the defendant's interpretation of its obligations under FCRA was correct.

Such an interpretation of the statute raises serious due process concerns by permitting jury-imposed punishment without providing fair notice to defendants of what they were required to do to avoid such punishment. At least a century's worth of precedent establishes that a statute is unconstitutionally vague if applied to punish—civilly or criminally—conduct that is "objectively reasonable," *i.e.*, conduct that reasonable people could conclude was lawful.

In *Screws* v. *United States*, 325 U.S. 91 (1945), this Court confronted the same constitutional issue and interpreted the same word, "willful," in a way that precluded punishment for conduct that was objectively reasonable. To avoid the constitutional problem in this case, this Court should interpret "willful" in the same way and require proof that the defendant knew it was violating a provision of FCRA that was sufficiently definite that its meaning at the time of the defendant's conduct was not subject to reasonable debate.

ARGUMENT

IF APPLIED TO PUNISH OBJECTIVELY REASONABLE CONDUCT, § 1681n WOULD VIOLATE THE FAIR NOTICE REQUIREMENTS OF DUE PROCESS

As Petitioners argue, the Ninth Circuit interpreted the term "willful" in 15 U.S.C. § 1681n to permit the imposition of punitive damages based solely on "negligence, gross negligence, or a completely good faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law." Geico Pet. *i.*; *see also* Safeco Pet. 2. That interpretation would render the statute unconstitutionally vague under the Due Process Clause of the Fifth Amendment. The Court should avoid that constitutional problem by adopting an interpretation of willful that precludes punishment for objectively reasonable conduct, just as it did in *Screws* v. *United States*, 325 U.S. 91 (1945).

1. This Court has repeatedly held that vagueness in a criminal or quasi-criminal statute violates due process if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999); *accord, e.g., Hill* v. *Colorado*, 530 U.S. 703, 732 (2000). "[B]ecause we assume that man is free to steer between lawful and unlawful

conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *accord*, *Morales*, 527 U.S. at 56 (fair notice principle serves the purpose of "provid[ing] the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits"). Punishment therefore may not be predicated on a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997).

This Court has never limited vagueness doctrine to criminal penalties; on the contrary, it has consistently applied the doctrine to civil statutes that are punitive in nature. *See, e.g., Village of Hoffman Estates* v. *Flipside*, 455 U.S. 489, 499 (1982) (employing strict vagueness scrutiny for statute that imposed quasi-criminal penalties); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966) ("[T]his state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"); *Champlin Ref. Co.* v. *Corp. Comm'n*, 286 U.S. 210, 241 (1932) (holding penalty statute unconstitutionally vague where it was designed not to remedy a violation but "to inflict punishment."); *A.B. Small Co.* v. *American Sugar Ref. Co.*, 267 U.S. 233 (1925) (holding statute unconstitutionally vague in civil case); *Sw. Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482 (1915)($6,300 civil penalty violated due process). Nor is the doctrine limited to statutory civil punishments. Indeed, with specific reference to punitive damages, this Court recently observed that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003) (quoting *BMW of N. Am.* v. *Gore*, 517

U.S. 559, 574 (1996)).[2]

2. In *Lanier*, this Court expressly recognized that the due process vagueness standard, which protects all citizens from punishment based on vaguely defined offenses, is functionally identical to the qualified immunity standard, which protects public officials from civil liability based on legal obligations that are not "clearly established." 520 U.S. at 270-71. As the Court observed, the qualified immunity test for public officers is "simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* And this Court's opinions establish beyond any doubt that officials are entitled to qualified immunity as long as their conduct is "objectively reasonable"—*i.e.*, as long as reasonable officials could conclude that the conduct at issue was lawful. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (immunity available if officers act in "objectively reasonable manner"; "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [the conduct was lawful"); *accord, e.g., Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (under "settled law," officers are entitled to immunity "if a reasonable officer could have believed" that his or her conduct was lawful); *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987) ("The

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[2] The "actual damages" allowed by 15 U.S.C. § 1681n(a)(1)(A)—a minimum of $100 regardless of actual losses—are unrelated to the amount of any actual damages suffered by a plaintiff. Thus, as noted by *amici* Farmers Insurance Co., these statutory damages are punitive in nature and subject to the same constitutional limitations as punitive damages. *Amicus* Br. of Farmers Ins. Co. of Or., *et al.*, at 12-13 n.7, citing *United States* v. *Halper*, 490 U.S. 435, 448 (1989), *overruled on other grounds by Hudson* v. *United States*, 522 U.S. 93 (1997), and *Fitzgerald Publ'g Co.* v. *Baylor Publ'g Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986).

relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's [conduct] to be lawful."). Accordingly, "if officers of reasonable competence could disagree on [the matter at] issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

3. At least a century of precedent supports this Court's conclusion in *Lanier* that the due process vagueness standard likewise precludes punishment where reasonable people acting in good faith can disagree on whether the conduct is lawful. In *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, 592 (1910), for example, a statute required every street railroad company to give passage to all persons desirous of using the railway cars "without crowding said cars." The defendant railroad company was charged with overcrowding its cars. Stating that "the dividing line between what is lawful and unlawful cannot be left to conjecture," the court held that the statutory prohibition of "crowded" railway cars was too indefinite and uncertain to support an indictment. *Id.* at 594.

> What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. What may be regarded as grounds for acquittal by one court may be held sufficient to sustain a conviction in another. The principle of uniformity, one of the fundamental elements essential in determining the validity of criminal statutes, is wholly lacking.

Id. at 596.[3]

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[3] Even before this Court began to address vagueness issues, lower courts had reached a consensus that statutes could not constitutionally be applied to impose quasi-criminal punishment where reasonable people could reach different conclusions about whether the conduct was

Sixteen years later, in *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926), this Court adopted the *Capital Traction* language as its own. The Oklahoma statute at issue in *Connally* imposed a fine and potential imprisonment for certain employers who failed to pay employees at least "'the current rate of per diem wages in the locality where the work is performed.'" 269 U.S. at 388. Quoting from *Capital Traction*, this Court observed that the "dividing line between what is lawful and unlawful cannot be left to conjecture," that a penal statute "must be so clearly expressed that the ordinary citizen can choose, in advance, what course it is lawful for him to pursue," that a "citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions," and that penal statutes "should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." *Id.* at 393.

It was in this context that this Court in *Connally* adopted the modern standard for evaluating vagueness claims on which it later relied in *Lanier*: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally*, 269 U.S. at 391.

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unlawful. *See, e.g., Louisville & Nashville R.R. Co.* v. *Railroad Comm'n*, 19 F. 679, 691 (C.C.M.D. Tenn. 1884) ("quasi criminal" penalties could not be imposed for charging "unjust" and "unreasonable" rates because one jury might find that the rates charged were unjust or unreasonable, while another jury, on the same facts, might find to the contrary, thereby "making the guilt or innocence of the accused dependent upon the finding of the jury, and not upon a construction of the act."); *Hewitt* v. *State Bd. of Med. Examiners*, 84 P. 39, 41 (Cal. 1906) (revocation of medical license for "grossly improbable statements" unconstitutional because "the members of one board might conclude that it contained 'grossly improbable statements,' while another board might reach an entirely opposite conclusion.").

Noting the ambiguity of both "current rate of wages" and "locality" in the statute, the Court concluded that the statute at issue was unconstitutionally vague because "the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries." *Id.* at 395.

4. Other decisions, both before and after *Connally,* have held statutes unconstitutional where liability depended on the "probably varying impressions" of courts and juries, *i.e.*, when such statutes were applied to punish defendants under circumstances where reasonable people (and, therefore reasonable courts and juries) could disagree about whether their conduct was lawful. *See, e.g. Colautti* v. *Franklin*, 439 U.S. 379, 401 (1979) (punishment improper where "experts can – and do – disagree"); *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U.S. 482 (1915). In *Danaher,* for example, an Arkansas statute required telephone companies to provide service to all applicants, subject to such "reasonable regulations" as the telephone company should establish. The defendant telephone company in *Danaher* had adopted a regulation under which it would not furnish service to patrons in arrears for past service and, further, would not provide to such patrons the discount normally allowed for paying in advance. The Arkansas Supreme Court found that the telephone company's regulation was unreasonable and that it had therefore violated the statute, and it affirmed a penalty of $6,300.

This Court held that the $6,300 penalty "was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." 232 U.S. at 491. The Court held that the penalty violated the "fundamental principles of justice" embraced by the due process clause because the defendant was justified in believing it was

reasonable, even if it was foreseeable that a court *might* hold the regulation unreasonable:

> If it be assumed that the state legislature could have declared such a regulation unreasonable, the fact remains that it did not do so, but left the matter where the company was well justified in regarding the regulation as reasonable and in acting on that belief. * * * Some regulation establishing a mode of inducing prompt payment of the monthly rentals was necessary. * * * The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions.

Id. at 490-91.

5. In short, numerous decisions of this Court over the last century, in several different contexts, all establish the fundamental principle that the "fair notice" required to accord due process prohibits punishment for conduct that reasonable people could conclude was lawful—conduct which, in the qualified immunity cases, the Court has called "objectively reasonable."[4]

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[4] The term "objectively reasonable" is perhaps unfortunate, because it suggests that there is some objective method—apart from the verdict of a jury or the judgment of a court—by which to definitively decide whether conduct is reasonable, creating the apparent paradox that conduct found by a court or jury to be "unreasonable" (or worse) can nevertheless be "objectively reasonable." *See Anderson* v. *Creighton*, 483 U.S. 635, 643 (1987). As this Court recognized in *Anderson*, however, the paradox is purely semantic in nature and can be eliminated by simply changing the words used to describe the relevant concept. *Id.* And there is nothing at all paradoxical about the concept: there are many

The Court has likewise interpreted the very word at issue in this case—"willful"—consistently with the above precedents in order to avoid a constitutional vagueness problem. In *Screws* v. *United States*, 325 U.S. 91 (1945), three law enforcement officers were charged with "willfully" depriving a prisoner of his constitutional rights in violation of the precursor to 18 U.S.C. § 242. Concerned about the constitutional implications of interpreting "willfully" in a way that would permit an officer to be punished for intentionally doing "an act which some court later holds deprives a person of due process of law," this Court interpreted "willfully" to require proof that the defendants had the "specific intent to deprive a person of a federal right made definite by decision or other rule of law." *Screws*, 325 U.S. at 97, 103.

This case can and should be resolved in the same way as *Screws*. Here, as in *Screws*, an unduly broad interpretation of "willful" creates the potential of unconstitutionally punishing defendants for an objectively reasonable interpretation of the law that is later rejected by the courts. Here, as in *Screws*, this constitutional problem can be eliminated by interpreting the statute to require proof that the defendant knew it was violating a provision of FCRA that is sufficiently definite that its meaning at the time of the defendant's conduct was not subject to reasonable debate.

As in the qualified immunity cases, the objective component of the standard adopted in *Screws* "protects 'all but the plainly incompetent or those who knowingly violate the

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circumstances where reasonable people, courts and juries, forced to decide whether conduct is "reasonable," can be expected to reach different conclusions, such that conduct found by some people to be unreasonable might be found by others to be reasonable. The fact that reasonable people might disagree on what constitutes negligence, for example, explains why judgment as a matter of law on negligence issues is rarely appropriate. *See, e.g., Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (summary judgment proper only if "a reasonable jury could [not] return a verdict for the nonmoving party").

law.'" *Anderson*, 483 U.S. at 638 (quoting *Malley*, 475 U.S. at 341). And the subjective component eliminates the possibility of punishment for mere incompetence. Even the objective component alone, applied—as due process requires—to punitive damages as it has been applied in so many other contexts over the last century, has the potential to substantially reduce the "acute danger of arbitrary deprivation of property" from the random imposition of punitive damages for actions about which reasonable people can disagree. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994)). Applied in this case, it prohibits punishing Petitioners for judgments about the meaning of FCRA that are consistent with those made by the district court and the Federal Trade Commission.

CONCLUSION

To the extent that the Ninth Circuit interpreted FCRA to permit statutory and punitive damages to be awarded even though reasonable people—including the district court and the Federal Trade Commission—agreed or could have agreed with the defendants' interpretations of their obligations under FCRA, that interpretation violates the due process clause of the United States Constitution. This Court should reverse.

Respectfully submitted,

WALTER DELLINGER
MATTHEW M. SHORS
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

DAVID G. LEITCH
Counsel of Record
JOHN M. THOMAS
Office of the General Counsel
Ford Motor Company
The American Road
Dearborn, Michigan 48126
(313) 322-7453

Counsel for Amicus Curiae

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Nos. 06-84 & 06-100

In the Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *ET AL.*,
PETITIONERS
v.
CHARLES BURR, RESPONDENT

GEICO GENERAL INSURANCE COMPANY, *ET AL.*,
PETITIONERS
v.
AJENE EDO, RESPONDENT

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR FREEDOMWORKS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

LINDA T. COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

GENE C. SCHAERR
Counsel of Record
STEFFEN N. JOHNSON
JEFFREY M. ANDERSON
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Fair Credit Reporting Act requires an insurance company to give notice of an "adverse action" whenever it makes an initial offer of insurance at a rate higher than the rate the company might have offered if the consumer had perfect credit.

2. Whether an insurance company may be liable for statutory and punitive damages for "willful" violation of the Fair Credit Reporting Act based upon a finding that it acted with "reckless disregard" of the statutory notice requirement, even where the company relied in good faith upon the advice of its counsel.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Fair Credit Reporting Act (FCRA) has been critical to the development of an efficient national credit market, a development that has been of enormous benefit to consumers at all income levels. Indeed, "[o]ne of the hallmarks of the modern U.S. economy is quick and convenient access to consumer credit. Although it would have seemed unimaginable a generation ago, consumers can now qualify for a mortgage over the telephone, walk into a showroom and finance the purchase of a car in less than an hour, and get department store credit within minutes." H.R. Rep. No. 108-263, at 23 (2003). FCRA has facilitated these important developments by promoting information-sharing between consumers and credit providers while protecting consumer privacy.

FCRA's success in creating a more consumer-friendly credit market is threatened by the Ninth Circuit's misinterpretations of key provisions of that statute. In holding that an "adverse action" requiring notice occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score" (*Reynolds* v. *Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1093 (9th Cir. 2006)), the Ninth Circuit requires insurance companies and their affiliates to provide adverse-action notices virtually every time they make an initial offer of insurance. These gratuitous notices likely will confuse consumers, frustrating the educational objective of the statute. And in holding that a "willful" violation of FCRA occurs whenever a company acts in "reckless disregard" of consumers' rights under the statute (*id.* at 1098), the Ninth Circuit

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, the *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

departed from the near-uniform position of other federal courts of appeals, opening the door to punitive awards even where users of credit information relied in good faith on the advice of counsel in determining their obligations under the statute.

Neither FCRA's text nor its structure nor its history compels these results, and FCRA's clear objectives counsel against them. The Ninth Circuit's gloss on the provisions at issue here thus reflects the policy judgments of that court, not the judgments of Congress, and for that reason the decisions below should be reversed.

Amicus curiae FreedomWorks Foundation has a strong interest in that result. FreedomWorks is a nonprofit, nonpartisan organization dedicated to promoting free-market solutions to economic problems at the state and national levels. For more than two decades, FreedomWorks and its predecessors and affiliates (including Citizens for a Sound Economy) have been leading voices on a range of economic policy issues, from taxation and regulation to entitlement reform, competitiveness, and consumer protection. FreedomWorks is interested in these cases because they highlight the importance of reasonable regulation by Congress, not courts, in the development of a consumer credit market that works for creditors and consumers alike.

STATEMENT

To understand the significance of the Ninth Circuit's decisions in these cases, it is necessary to have some familiarity with the realities of FCRA litigation. In the past several years, "there has been a proliferation of class action lawsuits brought under the [FCRA]," in part because of "the availability of fee shifting and statutory damages, and the lack of a class action damages cap." David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006). In nationwide class actions, these statutory damages—$100 to $1,000 per violation—threaten insurance companies and other covered businesses with "crush-

ing liability" that, as Justice Kennedy has recognized, could have "adverse effects on both the national economy and * * * employees." *Trans Union LLC* v. *FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of certiorari).

The cases now before the Court fit this mold. In these class actions, the named plaintiffs sought statutory damages of $100 to $1,000 for each class member, as well as punitive damages and attorney's fees, for alleged violations of FCRA. Among other things, the named plaintiffs alleged that petitioners violated FCRA's "adverse action" notice requirement (see 15 U.S.C. § 1681m) when they failed to tell the plaintiffs that the insurance rates they were offered were higher than the rates they would have received if they had perfect credit. The named plaintiffs further alleged that petitioners' failures to provide such notice constituted "willful" violations of the statute (see 15 U.S.C. § 1681n), entitling them to statutory and punitive damages. The named plaintiffs did not allege any actual damages resulting from the alleged violations.

Although the district court granted summary judgment in favor of the insurance companies, the Ninth Circuit reversed. *First*, the court adopted an expansive definition of "adverse action" for purposes of FCRA's notice requirement. FCRA provides that any person who "takes any adverse action with respect to any customer that is based in whole or in part on any information contained in a consumer report" must give "notice of the adverse action to the consumer." 15 U.S.C. § 1681m(a). With respect to insurance, the statute defines an adverse action as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B)(i).

In part at the suggestion of the Federal Trade Commission, the Ninth Circuit held, as a matter of first impression, that an insurance company may take an "ad-

verse action" in its initial offer of insurance—before a contract even exists. According to the Ninth Circuit, "an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price." *Reynolds*, 435 F.3d at 1091. Thus, "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA" and must provide an adverse-action notice. *Id.* at 1092. In the Ninth Circuit's view, FCRA "requires such notices whenever a consumer pays a higher rate because his credit rating is less than the *top potential score*." *Id.* at 1093 (emphasis added).

Second, the court held that the insurance companies could be liable for "willful" violations of the notice requirement even if they sought, and relied on, the advice of counsel in determining that notice was not necessary. FCRA provides that "[a]ny person who willfully fails to comply with any requirement under [FCRA] with respect to any consumer is liable to that consumer" for statutory damages, punitive damages, and attorney's fees. 15 U.S.C. § 1681n. Contrary to the clear majority position among the courts of appeals, the Ninth Circuit held that the term "willfully" in FCRA "entails a conscious disregard of the law, which means either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA *or in reckless disregard* of whether the policy [or action] contravened those rights." *Reynolds*, 435 F.3d at 1098 (emphasis added) (quotations omitted).

The Ninth Circuit adopted this "reckless disregard" standard based, in part, on its perception of "perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 1099. "Because a reckless failure to comply with FCRA's

requirements can result in punitive damages," the court reasoned, "insurance and other companies will more likely seek *objective* answers from their counsel as to the *true* meaning of the statute." *Ibid.* (emphasis added). Under the Ninth Circuit's rule, a company may be liable for statutory and punitive damages if a court determines that it relied on "creative lawyering that provides indefensible answers" even to issues of first impression. *Ibid.* "In some cases," the court warned, a finding of willfulness may be based on "specific evidence as to how the company's decision was reached, including the testimony of the company's executives *and counsel*." *Ibid.* (emphasis added).

SUMMARY OF ARGUMENT

I. The decisions below should be reversed because they adopt an overly expansive reading of FCRA's notice requirement that undermines the goal of consumer protection. Nothing in the statute suggests the Ninth Circuit's conclusion that notice of "adverse action" is required "whenever because of his credit information a company charges a consumer a *higher initial rate* than it would otherwise have charged." Nor does the statute suggest that an "adverse action" occurs whenever a consumers pays a higher rate than he would if he had *perfect credit*. Requiring insurance companies to provide notices under such circumstances will only drive up the costs of insurance while undermining the essential purpose of adverse-action notices. Without a clear textual warrant, the decisions below impose a notice requirement that is more likely to result in dilution of appropriate adverse-action notices than to enhance consumers' appreciation of their credit information.

II. The decisions below should be reversed for the additional reason that they interpret the term "willful" so broadly as to subject companies to statutory and punitive damages simply for relying upon legal advice that an appellate court later decides was mistaken. Neither the structure nor the history of this FCRA provision suggests

that statutory and punitive damages should be available absent conscious and deliberate violations of the statute. The Ninth Circuit's expansive view of "willful" violations will only raise the costs of compliance with the statute and thus the costs of obtaining insurance or other financial services. This result undermines FCRA's demonstrated success in creating a consumer-friendly credit market.

ARGUMENT

I. The Ninth Circuit's Expansive Reading Of FCRA's Notice Requirement Is Far Broader Than Congress Intended And Actually Undermines Consumer Protection.

As this Court has noted, "Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001) (citing 15 U.S.C. § 1681(a)). To accomplish these objectives, the statute regulates "consumer reporting agencies" that generate "credit reports" for use in determining consumers' eligibility for credit, insurance, and employment. See 15 U.S.C. §§ 1681a, 1681b. Under the statute, consumer reporting agencies must take steps to assure accuracy in credit information, to limit the disclosure of credit information to appropriate parties, and to give consumers access to their credit information so they can correct any mistakes. See *id.* §§ 1681(b), 1681b, 1681g. In addition, FCRA regulates *users* of credit reports such as the insurance companies here—requiring them to give consumers notice of so-called "adverse actions" taken based on their credit information. *Id.* § 1681m(a)(1).

In the decisions below, the Ninth Circuit adopted an unduly expansive interpretation of "adverse action" that imposes new burdens on insurers while undermining the effectiveness of the notice requirement for consumers.

A. The Ninth Circuit's New Rule Requires Insurance Companies And Their Affiliates To Provide Gratuitous Adverse-Action Notices, Thereby Increasing The Costs Of FCRA Compliance And Compromising The Effectiveness Of Appropriate Notices.

The decisions below require an insurance company to provide an adverse-action notice whenever it offers insurance for a price that is higher than the price that might have been offered had the consumer enjoyed a perfect credit score. Because almost every offer of insurance is based, in part, on risks identified in the consumer's credit report, and because only a few consumers have perfect credit, nearly every offer of insurance would have to be accompanied by an adverse-action notice. Moreover, the Ninth Circuit's novel interpretation of "adverse action" requires insurers to issue many more notices than they issued before. This requirement imposes significant new costs of compliance with FCRA—costs that undoubtedly will be passed on to consumers in the form of increased prices or decreased availability of coverage or both.

Even as the Ninth Circuit's rule increases the costs of FCRA compliance for insurers, it actually *undermines* the important functions that Congress intended adverse-action notices to perform by contributing to a phenomenon known as "information overload." "The psychological theory of information overload posits that humans can be overwhelmed by too much information such that their ability to cognitively process the information declines." Marie C. Pollio, *The Inadequacy of HIPAA's Privacy Rule: The Plain Language Notice of Privacy Practices and Patient Understanding*, 60 N.Y.U. Ann. Surv. Am. L. 579, 614 (2004). As Nobel Laureate Herbert Simon explained, "a wealth of information creates a poverty of attention." Herbert A. Simon, "Designing Organizations for an Infor-

mation-Rich World," *in Computers, Communications, and the Public Interest* 37, 40 (Martin Greenberger ed., 1971).[2]

This theory has obvious relevance to any regulatory scheme—including FCRA—that seeks to protect consumers by emphasizing disclosure of information. In the specific context of consumer-protection notices, the "information overload" theory suggests that "if too much information is disclosed to consumers, they are easily confused, cannot use the information, and do not make better decisions as a result." Arnold S. Rosenberg, *Better Than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy*, 44 Colum. J. Transnat'l L. 520, 593 (2006).

To avoid "information overload," disclosures "must be brief and simple enough to be readily assimilated" and "certain details must be omitted." Griffith L. Garwood, *et al.*, *Consumer Disclosure in the 1990s*, 9 Ga. St. U.L. Rev. 777, 782-783 (1993). Moreover, "[t]he failure to meet this prerequisite risks destroying the utility of disclosure." *Ibid.* Indeed, "[a] disclosure that is not read at all or is too complex for practical use is no disclosure" and provides no benefit to consumers. *Ibid.*

As shown below, the adverse-action notices required by the Ninth Circuit are certain to contribute to "information overload" in at least two ways. *First*, the significant increase in the volume of adverse-action notices will diminish the effectiveness of any particular notice. *Second*, the contents of these notices will be more confusing than ever before because they will describe as "adverse" actions that are not really adverse to the consumer at all and will

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[2] See also Carl Shapiro & Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* 6 (Harvard Business School Press 1999) ("Nowadays the problem is not information access but information overload. The real value produced by an information provider comes in locating, filtering, and communicating what is useful to the consumer").

name companies with which the consumer never had any dealings.

1. Increasing the *volume* of adverse-action notices undermines FCRA's goal of educating consumers about their credit information. Common experience and social science research suggest that the more adverse-action notices a consumer receives, the less importance he will attach to any *particular* notice and the less attention he will pay to *all* such notices.

This Court recognized this phenomenon in the context of disclosures required by the Truth in Lending Act (TILA). Under TILA, certain consumer credit transactions must be accompanied by disclosures so that consumers are fully aware of the material terms of their credit agreements. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 559-560 (1980). The animating principle of the statute is "meaningful disclosure." *Id.* at 568. As this Court observed in *Milhollin*, "[m]eaningful disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure * * * and the need to avoid * * * [informational overload.]'" *Ibid.* (alterations in original). This problem of "informational overload" threatens the very objective of TILA, namely, consumer protection.

The Federal Trade Commission has recognized the same danger in the specific context of FCRA adverse-action notices. The Director of the FTC's Bureau of Consumer Protection explained to Congress that "if you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore. The adverse-action notice, as it was originally envisioned, fit well in the set of circumstances where consumers needed to pay attention to the credit report and did not raise a lot of false alarms." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Hous-*

ing, & Urban Affairs, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III).

Unfortunately, by requiring that notice be given "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *Reynolds*, 435 F.3d at 1093, the Ninth Circuit has ensured that there will be "a lot of false alarms" that will only compromise the effectiveness of appropriate adverse-action notices.

2. In addition to increasing the *volume* of adverse-action notices, the Ninth Circuit's rule promises "information overload" and consumer confusion with respect to the *contents* of adverse-action notices as well. Congress made its own judgment about the proper contents of an adverse-action notice. That judgment is reflected in the statute itself, which requires that an adverse-action notice identify the credit reporting agency; state that the credit reporting agency did not make the decision to take the adverse action; state that the consumer is entitled to a free copy of his credit report within 60 days after receiving the notice; and explain that the consumer may dispute the accuracy or completeness of any information contained in his credit report. See 15 U.S.C. § 1681m(a)(1)-(3).

Not satisfied with the notice that Congress envisioned, the Ninth Circuit imposed its own additional requirements. Under the decisions below, an adverse-action notice "at a minimum" must also "communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action." *Reynolds*, 435 F.3d at 1094-1095. Moreover, the decisions below require that an adverse-action notice identify *every affiliated entity* that (theoretically) participated in setting premium rates, whether or not the consumer had any contact with each entity. See *id.* at 1096. A consumer receiving the notice required by the Ninth Circuit thus will wonder why companies with

which he had no dealings are sending him a notice about his credit information. Indeed, he might suspect that his insurer improperly "leaked" his credit report to other companies.

Consumer confusion will be magnified in circumstances where an adverse-action notice accompanies an offer of insurance that was not actually adverse to the consumer's interests. Under the decisions below, an insurance company must give notice of an "adverse action" when it extends an offer of insurance at a rate higher than the best rate available for a consumer with perfect credit. This rule fails to account for situations in which a consumer's credit score, though less than perfect, had *no effect* on his application or even *helped* him obtain insurance.[3]

Suppose, for example, that a consumer with a long list of moving violations applies for auto insurance. Based on this consumer's age, sex, and driving record, the insurer might decline coverage altogether. Or if it does offer insurance, the rate will be relatively expensive. Now suppose the insurer reviews the applicant's credit report, which reveals that the applicant has never missed a payment on his credit cards but almost always makes the minimum payment. This applicant would not have the "top potential score" that the Ninth Circuit emphasizes, but his credit experience might change—*for the better*—the insurer's assessment of the risk he poses. So the insurer would make an offer of insurance at a rate that is

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[3] A consumer's credit score reflects payment history, amounts owed, length of credit history, new accounts, and the types of credit in use. See *Understanding Your FICO Score* 9-14 (Fair Isaac Corp. 2005), *available at* http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf. Thus, even if a consumer's payment history was spotless, he still might not have a perfect credit score. Given the range of factors that contribute to the score, it is not surprising that only 13 percent of consumers have a credit score higher than 800 (out of a possible 850). See *id.* at 7.

lower than the rate available based solely on the applicant's non-credit-related characteristics but *higher* than the rate available to a person with perfect credit.

Giving this consumer an adverse-action notice along with his offer of insurance—as the Ninth Circuit requires—would make little sense to the insurer or the consumer. The insurer knows that the consumer's credit information is what has made it possible for the consumer to obtain insurance at all. And the consumer—who never expected to be treated as if he had perfect credit, since he never had perfect credit—will not understand what is "adverse" about his being offered insurance despite his risk characteristics.

Providing adverse-action notices with initial offers of insurance defies common sense, and will likely confuse consumers rather than educate them. As this Court has observed, *more* notice and *effective* notice are two very different things. See *Milhollin*, 444 U.S. at 569. Discerning the appropriate use of adverse-action notices requires making sensitive policy judgments based on empirical data from the fields of communications and consumer psychology—to ensure that disclosure does not result in "information overload." As the decisions below demonstrate, this policymaking task is better undertaken by legislatures than by courts.

B. Contrary To The FTC's Position Below, The Ninth Circuit's Expansive Interpretation Of "Adverse Action" Is Not Supported By The Statutory Text Or History And Is Inconsistent With The Fundamental Objectives Of The Statute.

It is bad enough that the decisions below increase the costs of FCRA compliance (and thus the costs of insurance) without providing any additional benefit to consumers. Even worse, the decisions below achieve this result without any clear textual or historical warrant and contrary to the essential purposes of the statute.

1. Nothing in the text or structure of the FCRA compels the conclusion that an adverse-action notice is required whenever an insurer offers insurance at a rate higher than the rate that would be available to a consumer with perfect credit. FCRA requires an insurance company to provide notice to the consumer of any adverse action that it takes in connection with its underwriting decisions, based in part on the consumer's credit report. 15 U.S.C. § 1681m(a)(1). In the context of insurance, FCRA defines adverse action as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i). The cases before the Court do not involve the denial or cancellation of insurance, but only an *initial offer* of insurance. Thus, the question in these cases is whether an insurance company's initial offer of insurance can reflect "an increase in any charge for" insurance and thus an "adverse action" requiring notice.

According to the Ninth Circuit, "the statute's text is clear" and compels the conclusion that an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score." *Reynolds*, 435 F.3d at 1092-1093. But nothing in the statute's text even suggests, much less compels, a comparison between the consumer's actual credit rating and "the top potential score."

In fact, the text speaks of an "increase" in the "charge" for insurance. As the court below acknowledged, the word "increase" ordinarily means "to make something greater." *Id.* at 1091. And the word "charge" ordinarily means "the price demanded for goods or services." *Ibid.* Thus, for an insurance company to effect "an increase in any charge" for insurance, it must somehow make greater the price it demands for insurance. But "greater" is always relative to some referent. And that referent is missing from the text of the statute.

Since that specific term is missing, the Court must draw a reasonable inference from the text and structure of the statute. The obvious inference is that an insurance company can only "increase" a "charge" that already exists. Especially in the context of contractual negotiations, it would be unusual to speak of one party's "increasing" the price of its goods or services before it even offered to sell those goods or services.

The Ninth Circuit drew a different inference, relying upon the phrase "any insurance, existing or applied for." According to the Ninth Circuit, this "existing or applied for" language "demonstrates [Congress's] intent that 'adverse actions' apply to all insurance transactions—from an initial policy of insurance to a renewal of a long-held policy." *Ibid.* But this language cannot bear the weight of the Ninth Circuit's conclusion. To say that an insurance company may take an "adverse action" with respect to an application for insurance—*by denying the application*—is not to say that an insurance company may take "adverse action" with respect to an application for insurance *by other means* as well.

Indeed, the phrase "existing or applied for" cannot apply wholesale to each of the components of the "adverse action" definition. As explained above, FCRA defines "adverse action" as a "denial" of insurance, a "cancellation" of insurance, an "increase in any charge" for insurance, or a "reduction or other adverse or unfavorable change in the terms of coverage or amount" of insurance. 15 U.S.C. § 1681a(k)(1)(B)(i). It makes no sense to speak of the "denial" of an existing insurance contract, or the "cancellation" of insurance that has only been applied for. And it is hardly common to speak of increasing the charge or changing the terms of insurance that has not yet been extended. Thus, the only reasonable interpretation of the "adverse action" definition is that an insurance company takes an "adverse action" when it denies a consumer's *application* for insurance; cancels his *existing* insurance; or raises the price or otherwise changes the terms of his *existing* insur-

ance. For purposes of these cases, then, there must be an existing insurance contract before there can be any *increase* in the charge for that insurance.

Finally, even if it were possible to find an "adverse action" arising from an insurance company's initial offer of insurance, the Ninth Circuit's holding that an "adverse action" occurs whenever a consumer does not receive the terms he would have received if he had *perfect credit* is not supported by the statute. Indeed, the text itself makes no reference to the hypothetical perfect credit score. If a consumer receives an offer of insurance at a certain price and on certain terms based on non-credit-related characteristics—*e.g.*, age, sex, or driving record—then he is adversely affected by his credit rating only if the insurer, after considering the credit rating, *changes* the offer by raising the price or reducing the coverage or otherwise making the terms less favorable. The relevant comparison is between the applicant described by all his characteristics *except* his credit rating and the same applicant described by all his characteristics *including* his credit rating.

In short, there is no sound textual basis for the Ninth Circuit's expansive interpretation of "adverse action."

2. Nor is there any sound basis for that interpretation in the legislative history, including the history cited by the Federal Trade Commission below. The report accompanying the Senate bill that was ultimately enacted into law, for example, says that the bill would apply to "[t]hose who * * * *charge a higher rate for credit or insurance* wholly or partly because of a consumer report." S. Rep. No. 91-517, at 7 (1969) (emphasis added). But this phrase, like the statute itself, begs the question whether a consumer can be "charge[d] a higher rate" before a contract of insurance even exists. It surely does not answer the question.

The same is true of Congress's more recent attempts to revise the statute. In the early 1990s, Congress considered several bills designed to extend FCRA's reach to us-

ers of credit reports not mentioned in the Act. See, *e.g.*, H.R. 3596, 102d Cong. § 102(a) (1992) (extending FCRA to cover adverse actions triggered by "a report for the cashing of a check" and "an application for the leasing of real estate"). These *unsuccessful* efforts to cover specific non-insurance transactions cannot demonstrate any prior legislative intention to apply the notice requirement to initial offers of insurance.

And when, in 1995, Congress successfully broadened FCRA to cover adverse actions occurring when insurance is "applied for," it did not file a report explaining the impact of this amendment. Although a report did accompany a non-enacted proposal, S. 650, that report simply repeats the statutory language without reaching the question presented here. See S. Rep. No. 104-185, at 31-32 (1995).

In short, the legislative history does not address the question whether an "adverse action" can occur in making an initial offer of insurance, much less support the Ninth Circuit's expansive interpretation of "adverse action."

3. The Ninth Circuit's rule also upsets the careful balance of interests that Congress struck when it enacted the statute. Congress enacted FCRA recognizing that "[t]he banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

Reliable credit information is essential to risk assessment and pricing decisions in the consumer credit market. Research has demonstrated a significant correlation between credit scores and the number and size of future losses. See Bureau of Business Research, *A Statistical Analysis of the Relationship Between Credit History and Insurance Losses* 10 (2003), *available at* http://bbr.icc.utexas.edu/Publications/bbr_creditstudy.pdf.. "Overall, research and creditor experience has consistently indicated

that credit reporting company information, despite any limitations that it may have, generally provides an effective measure of the relative credit risk posed by prospective borrowers." Robert B. Avery, *et al.*, *An Overview of Consumer Data and Credit Reporting*, Federal Reserve Bulletin 47, 51 (Feb. 2003).[4]

Given this correlation, insurance companies frequently use credit information for legitimate risk-assessment purposes. "Risk classification allows insurers to divide individuals into groups with similar claims and set prices based on the probability of future loss. Driving history, age and gender are common variables to classify risk, but increasingly insurance scores with credit have been found to be more reliable predictors of future risk." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 67 (Statement of Wayne T. Brough).

Such risk-based pricing is beneficial to consumers. Because credit risk is a better predictor of future claims and losses than other information, insurance companies that rely on credit risk are better able to avoid setting prices unnecessarily high.[5] Moreover, just as credit information

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[4] See also *Fair Credit Reporting Act: How It Functions for Consumers and the Economy, Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 108th Cong. 40 (2003) (Statement of Kevin T. Sullivan, Vice President and Deputy General Counsel, Government Relations, Allstate Insurance Company) ("the insurance industry and Allstate in particular began to recognize a strong correlation between major public record items on credit reports and future loss potential"); *id.* at 67 (Statement of Wayne T. Brough, Chief Economist, Citizens for a Sound Economy) ("there is a very strong statistically significant correlation between risk and credit scores").

[5] See *id.* at 233 (Testimony of Wayne T. Brough) ("Restricting credit history information as an underwriting tool would result in higher costs for insurers and higher premiums for policyholders").

helps regulate absolute pricing, it also improves the fairness of risk classification and thereby increases the availability of insurance to classes of consumers who otherwise might go without coverage. As a Federal Reserve official explained, "[c]onsumers benefit from the increased availability and lower cost of credit made possible by the use of credit scoring models. Credit scoring also may help to reduce unlawful discrimination in lending to the extent that these systems are designed to evaluate all applicants objectively and thus avoid issues of disparate treatment." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions*, *supra*, at 551 (Prepared Statement of Dolores S. Smith, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System).[6]

Encouraging the use of such risk-based information is fully consistent with the balance that Congress struck in enacting FCRA. While Congress responded to the "need to [e]nsure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy," Congress also

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[6] See also *id.* at 59 (Response to Written Questions of Senator Crapo from J. Howard Beales, III) ("Credit scoring and automated underwriting work in significant ways to minimize the bias—intentional or incidental—that can be introduced into credit decisions in a judgmental system, because credit scoring models and automated underwriting systems are based on actual performance data, not assumptions about potential risk. * * * Because these data are objective and neutral, we believe that the current scoring systems treat consumers more fairly"); *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 232 (Testimony of Wayne T. Brough) ("[W]hen consumer credit histories are used as an underwriting criterion, they tend to increase the fairness and accuracy of risk classification. * * * With the ability to classify risk more accurately, insurers gain the ability to provide a wider array of products that can be offered to customers they otherwise could not serve").

recognized that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(3)-(4). The statute thus "strikes a balance between the privacy interests of consumers with respect to the contents of their credit reports and the need of businesses to access the information required to make accurate real time assessments of consumer qualifications." S. Rep. No. 108-166, at 5 (2003).[7]

The Ninth Circuit's decisions threaten to upset this balance by requiring disclosure of insurer decisions that are not truly "adverse" in any meaningful sense. Because, as noted earlier, such disclosures would likely result in a blizzard of meaningless but annoying consumer notices, the Ninth Circuit's decisions tend to discourage insurers from using credit information in their initial offering decisions. By discouraging the use of that information, those decisions undermine the balance that Congress struck between financial services' need to make full use of credit information and consumers' interest in privacy and disclosure.

II. The Ninth Circuit's Expansive Interpretation Of FCRA's Willful-Violation Provision Exposes Companies To Statutory And Punitive Damages For Unwitting Violations Of The Statute And Increases The Costs Of Credit To Consumers.

The Ninth Circuit's over-regulation of consumer credit transactions is harmful enough. But the court compounded that error with another one that is perhaps even more certain to drive up the costs of credit and insur-

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[7] See also *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions*, *supra*, at 6 (Statement of J. Howard Beales, III) ("The 1970 Act, along with the 1996 Amendments, provided a carefully balanced framework, making possible the benefits that result from the free, fair, and accurate flow of consumer data").

ance: The decisions below hold that an insurance company commits a "willful" violation of FCRA—and thus may be liable for statutory and punitive damages—when it acts with "reckless disregard" for consumers' rights under the statute. And according to the Ninth Circuit, a company may act recklessly even when it follows its counsel's advice concerning statutory requirements, even when that advice concerns an issue of first impression, and even when that advice is approved by at least one federal judge. This new rule is not supported by the structure of the statute or its legislative history, and it creates costly practical problems for companies and their counsel. By raising the costs of FCRA compliance in this manner, the decisions below threaten to stifle the information-sharing that has been critical to the development of a consumer-friendly credit market.

A. The Ninth Circuit's "Reckless Disregard" Standard Is Not Supported By The Structure Of The Statute Or Its Legislative History.

By its terms, FCRA subjects insurance companies to statutory and punitive damages liability only for "willful" violations of statutory requirements. See 15 U.S.C. § 1681n(a). As this Court has explained, "willful" is a term of "many meanings," and its proper interpretation is "often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998); *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *Spies* v. *United States*, 317 U.S. 492, 497 (1943). The textual and historical "context" in which the willfulness requirement appears confirms that Congress did not intend to make statutory and punitive damages available for anything less than knowing, deliberate violations of statutory requirements. The Ninth Circuit's contrary holding stands in sharp contrast to the majority rule among the federal circuits, and it should be reversed.

1. The text of the statute strongly suggests that statutory and punitive damages should be reserved for only the

most egregious FCRA violations. To be sure, FCRA does not expressly define "willful" in either of the two provisions where that term is used. And the context of the first provision—the one at issue here—sheds little light on the matter; it simply authorizes statutory and punitive damages for "willful" violations of most FCRA requirements. 15 U.S.C. § 1681n(a)(1)(A).

But the second provision is highly instructive: It entitles a consumer to receive the greater of his actual damages or $1,000 for a "willful" violation of FCRA's prohibition against "obtaining a consumer report *under false pretenses* or *knowingly* without a permissible purpose." *Id.* § 1681n(a)(1)(B) (emphasis added).[8] Thus, it is clear from this provision that "willful" describes misconduct that is *at least* knowing. Because a statutory term should ordinarily be deemed to have the same meaning throughout a statute (see *Ratzlaf*, 510 U.S. at 143), the term "willful" should have the same meaning in both provisions of FCRA. A company should not be liable for "willfully" violating FCRA's notice requirement absent proof that it *knew* it was violating the statute.

2. This conclusion is confirmed by the legislative history, which shows that Congress distinguished "willful" misconduct from grossly negligent, or reckless, misconduct, and made a considered decision to reserve the drastic remedies of statutory and punitive damages for only the most egregious violations. The original Senate bill required the plaintiff to show that the defendant was "grossly negligent" to obtain *actual* damages, and that the violation was "willful" to obtain *punitive* damages. See S. 3678, 91st Cong. §§ 616, 617 (1970). Because gross negligence is "little different from recklessness as generally

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[8] FCRA also provides a criminal penalty for "any person who *knowingly and willfully* obtains information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q (emphasis added).

understood in the civil law" (*Farmer* v. *Brennan*, 511 U.S. 825, 836 n.4 (1994); accord *Restatement (Second) of Torts* § 282 cmt. e (1965)), the effect of the Senate bill was to distinguish misconduct that was merely reckless from misconduct that was more egregious, *i.e.*, "willful." Likewise, the House bill distinguished recklessness from willfulness, rejecting alternative proposals that would have authorized punitive damages for violations that were "grossly negligent or willful." See H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970). Thus, it was the unmistakable intention of Congress to set apart conduct that was more egregious than gross negligence (or recklessness) for punitive damages liability.

3. Consistent with the structure of FCRA and its legislative history, most federal circuits have concluded that statutory and punitive damages are available only where the defendant knowingly and consciously violated FCRA's requirements. See *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357, 368-370 (8th Cir. 2002); *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Stevenson* v. *TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993).[9] As the Eighth Circuit explained in *Phillips*, "the defendant must commit the act that violates the Fair Credit Reporting Act with knowledge that he is committing the act * * * and he must *also* be conscious that his act impinges on the rights of others." 312 F.3d at 368 (emphasis added). The Ninth Circuit's relaxed standard for "willful" violations of FCRA is the outlier, and it should be rejected.

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[9] Although the Third Circuit seemed to adopt a "reckless disregard" standard, it further explained that a defendant's conduct must be "on the same order as willful concealments or misrepresentations" to warrant statutory and punitive damages. *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).

B. The Ninth Circuit's Rule Increases The Costs Of Compliance With FCRA, Thereby Increasing The Costs Of Credit To Consumers And Jeopardizing FCRA's Success In Creating An Efficient Credit Market.

The Ninth Circuit's expansive interpretation of "willful" also increases the costs of FCRA compliance by opening the gates to statutory and punitive damages claims even where covered firms relied in good faith on the advice of counsel with respect to unsettled issues under FCRA. See *Reynolds*, 435 F.3d at 1099. The availability of statutory and punitive damages in such situations will create significant pressures to settle even dubious claims—to the ultimate detriment of consumers—even as it fundamentally alters the relationship between insurance companies (and other credit providers) and their counsel. This result promises to stifle the information-sharing that has been critical to the development of an efficient credit market under FCRA.

1. The Ninth Circuit's position leaves companies little room to defend against plaintiffs' claims for statutory and punitive damages. Under the decisions below, it is no defense that the statutory requirement was unclear; that the company relied in good faith on its counsel's interpretation of that requirement; or even that a federal district court agreed with counsel's interpretation. Indeed, the district court in these cases granted the insurance companies judgment as a matter of law on the ground that their interpretations of FCRA's notice requirements were correct. But the court of appeals disagreed, and went so far as to label those same interpretations "implausible." *Ibid.* In sum, the decisions below appear to give companies no reliable defense to a claim for statutory and punitive damages other than *a court of appeals' ultimate conclusion* that counsel correctly interpreted the statute.

This is not much of a defense, especially since the burden appears to rest on the *company* to refute an allegation

of "willful" violation of the statute. According to the Ninth Circuit, a business may be liable for statutory and punitive damages *unless* it "diligently and in good faith" sought to determine its statutory obligations and "thereby" took a "reasonable" or "tenable" position under the statute. *Ibid.* Under this standard, it will be nearly impossible to obtain early resolution of meritless FCRA claims: A named plaintiff seeking statutory and punitive damages in a nationwide class action will survive a motion to dismiss based on nothing more than a bare assertion, on information and belief, that the company "willfully" violated some FCRA requirement.

This result increases the likelihood that companies subject to FCRA will bear the costs of statutory and punitive damages awards, either by paying large judgments or by entering into "blackmail settlements." As Judge Easterbrook has explained, settlement in class litigation "becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-1016 (7th Cir. 2002); see also *Parker* v. *Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (class actions for statutory damages "could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements"); *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.) (class treatment "can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight"); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"). Judge Friendly made the same observation, explaining that "[w]hile the benefits to the individual class members are usually minuscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled."

Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

Consumers will pay the price for covered firms' increased exposure to statutory and punitive damages liability. The increased risk will undoubtedly translate into higher rates. And it may well result in reduced coverage for certain classes of insureds.

2. More frequent statutory and punitive damages awards and blackmail settlements are not the only costs imposed by the decisions below. In addition, businesses likely will react to the Ninth Circuit's lax standard for "willful" violation either by conducting their operations in the most conservative manner possible, by obtaining "second opinions" to test their own counsel's advice, or both. This is hardly the model that the Court envisioned in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), when it affirmed the role of corporate counsel in advising their clients how to comply with complicated, sometimes counterintuitive, statutes and regulations. Indeed, our system expects businesses to seek, *and rely on*, the advice of their counsel in determining how to comply with federal statutory requirements. The mere fact that a court of appeals later determines that counsel's advice was incorrect might be enough to warrant an award of actual damages, but it cannot be enough to justify statutory and punitive damages.

The pernicious effect of the decisions below is thus to increase the costs of the most responsible corporate behavior—consulting legal counsel before engaging in business practices regulated by federal statute. See *id.* at 392 (acknowledging the "valuable efforts of corporate counsel to ensure their client's compliance with the law"). These costs undoubtedly will be passed on to consumers, who will receive no additional benefit beyond that which ordinary remedies would provide.

3. By increasing the costs of compliance with FCRA in this manner, the Ninth Circuit effectively reduces compa-

nies' incentives to make appropriate use of credit information. This result threatens to undo the tremendous benefits that the statute has provided. The balance that Congress struck in FCRA—allowing businesses to use credit information while providing consumers with notice of genuinely adverse credit-related actions—has been vindicated by the performance of the Nation's consumer credit market. Credit is available to more consumers today than ever before, at least in part because FCRA created a uniform national system of credit reporting that promotes efficiency in information-sharing, accuracy in risk assessment, and privacy for consumers. In short, "American consumers have realized undeniable benefits from the free flow of credit reporting information to lenders and other financial services providers." H.R. Rep. No. 108-263, at 25 (2003).

Consumers benefit from the free flow of credit information in several ways. As one Federal Reserve Board official explained in testimony before a congressional committee: "The ready availability of accurate, up-to-date credit information from consumer reporting agencies benefits both creditors and consumers. Information from consumer reports gives creditors the ability to make credit decisions quickly and in a fair, safe and sound, and cost-effective manner. Consumers benefit from access to credit from different sources, vigorous competition among creditors, quick decisions on credit applications, and reasonable costs for credit." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 431 (Statement of Dolores Smith).[10]

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[10] See also *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 86 (Statement of Cheryl St. John, Vice President, Fair Isaac Corporation) ("with credit scoring, more people get credit; they get it faster; and it is more affordable. By enabling lenders to extend credit quickly, while safely managing their risk, credit scores have made credit more accessible at lower rates to more people. More people can get

Moreover, the consumer credit market that FCRA has helped create is more "democratized" than ever before, with credit available to more consumers at all income levels. "Over the last 30 years, the availability of non-mortgage credit to households in the lowest quintile of income has increased by nearly 70 percent—including a nearly three-fold increase in the number of low-income households owning credit cards just in the last decade." H.R. Rep. No. 108-263, at 23 (2003). According to one congressional report, "[t]his unprecedented 'democratization' in the availability of credit to low- and moderate-income consumers has been made possible in significant measure by the emergence of a national credit reporting system" facilitated by FCRA. *Ibid.*

These important successes are jeopardized by the decisions below. Especially by making statutory and punitive damages available for unwitting violations of the statute, the Ninth Circuit has raised the costs of FCRA compliance and reduced companies' incentives to make appropriate use of credit information. In short, the decisions below threaten to stifle the information-sharing that has been critical to the development of a consumer-friendly credit market under FCRA.

* * * * *

The decisions below rest on fundamental misreadings of FCRA that significantly increase the costs of compliance with the statute. Users of credit reports will pay those costs in the first instance, but consumers will pay them in the end, in the form of higher prices and reduced coverage. The decisions below thus amount to judicial over-regulation of the consumer credit market, and they should not be permitted to jeopardize FCRA's continued success

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credit because credit scores allow lenders to safely assess and account for the risk of consumers who are new to that lender and who many have been turned away by other lenders").

in promoting the free flow of credit information while protecting consumer privacy.

CONCLUSION

The decisions below should be reversed.

Respectfully submitted.

LINDA T. COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

GENE C. SCHAERR
Counsel of Record
STEFFEN N. JOHNSON
JEFFREY M. ANDERSON
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

Counsel for Amicus Curiae

NOVEMBER 2006

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Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR, *et al.*,

Respondents.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE INSURANCE COMMISSIONERS OF THE STATES OF DELAWARE, ARKANSAS, CALIFORNIA, GEORGIA, IOWA, KANSAS, MICHIGAN, MONTANA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, UTAH AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PATRICK T. RYAN
Counsel of Record
ANNEMARIE BRIDY
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP
123 SOUTH BROAD STREET
PHILADELPHIA, PA 19109
(215) 772-1500

Attorneys for Matthew P. Denn,
Insurance Commissioner of Delaware

[*Additional counsel listed on signature page*]

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INTEREST OF AMICI CURIAE[1]

This brief is submitted in support of respondents Charles Burr, Shannon Massey and Ajene Edo on behalf of thirteen state insurance commissioners: (1) Matthew P. Denn, the Insurance Commissioner of Delaware; (2) Julie Benafield Bowman, the Insurance Commissioner of Arkansas; (3) John Garamendi, the Insurance Commissioner of California; (4) John W. Oxendine, the Insurance Commissioner of Georgia; (5) Susan E. Voss, the Insurance Commissioner of Iowa; (6) Sandy Praeger, the Insurance Commissioner of Kansas; (7) Linda A. Watters, the Insurance Commission of Michigan; (8) John Morrison, the Insurance Commissioner of Montana; (9) Morris J. Chavez, Superintendent of the Insurance Division of the New Mexico Public Regulation Commission; (10) Jim Poolman, the Insurance Commissioner of North Dakota; (11) Kim Holland, the Insurance Commissioner of Oklahoma; (12) D. Kent Michie, the Insurance Commissioner of Utah; and (13) Mike Kreidler, the Insurance Commissioner of Washington (collectively "the Amici State Insurance Commissioners").

This case involves the interpretation of provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, that directly impact the millions of consumers who purchase and renew insurance policies every year. The statutory provisions at issue govern the rights of consumers and the responsibilities of insurance companies with respect to the use of consumer credit information in the underwriting and rating process.

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1. Written consents of all parties have been filed with the Clerk. This brief was authored in whole by counsel for the amici curiae. No party or his/her/its counsel authored the brief in whole or in part, and no person or entity other than the amici curiae made any monetary contribution to the preparation or submission of the brief.

One of the most important missions of the Amici State Insurance Commissioners (and other state insurance commissioners) is to ensure reliable insurance coverage at reasonable rates for consumers. Because a growing number of personal auto and homeowners insurance companies use consumer credit information when deciding whether to issue or renew coverage and when deciding what prices to charge for coverage, the Amici State Insurance Commissioners have undertaken to educate the public about the use of credit scores in the underwriting process and to protect the public by implementing and enforcing policies that promote the responsible and accurate use of consumer credit information.

This case represents an opportunity for the Amici State Insurance Commissioners to further their collective mission of protecting consumers by supporting interpretations of the FCRA that (a) put valuable information in the hands of consumers, (b) provide appropriate incentives for insurance companies that use consumer credit information to adopt procedures that assure compliance with the law, and (c) hold insurance companies accountable when they adopt policies that recklessly disregard consumer rights in contravention of the FCRA.

SUMMARY OF ARGUMENT

The Ninth Circuit correctly determined that the defendant insurance companies were not entitled to summary judgment on the plaintiffs' claims that the insurance companies' failure to send them "adverse action" notices under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, could warrant the enhanced remedies that § 1681n provides when a person covered by the statute has "willfully failed to comply" with any of the statute's requirements.

This Court has long held that "willful" violations of civil statutes encompass both "knowing" noncompliance and "reckless disregard" for whether one's conduct complies with a statutory obligation. The Ninth Circuit's decision that the enhanced remedies of § 1681n could be triggered by an insurance company's "reckless disregard" for whether a chosen interpretation of the FCRA's requirements complied with the statute was therefore correct.

The Ninth Circuit's description of the types of conduct that could satisfy a "reckless disregard" standard was likewise correct. The court's description would not permit liability under § 1681n for conduct that is merely negligent. A credit information user who purposely relies on "creative lawyering" to provide "creative" but "indefensible" answers to questions about the extent of the user's obligations under the FCRA is not acting negligently. It is acting in conscious or reckless disregard of what the statute requires.

The Ninth Circuit also correctly determined that petitioner GEICO's policy, in place between 1999 and 2002, for determining what constitutes an "adverse action" had no basis in the statute and could amount to a "willful" violation of the FCRA.

This Court should affirm the Ninth Circuit because its decision is consistent with the FCRA's underlying policy of consumer protection. The statute itself provides that credit reporting agencies and users of credit information bear "grave responsibilities" to act fairly and accurately and to respect the rights of consumers. The Ninth Circuit's decision provides appropriate incentives to assure compliance with the statute's requirements.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISIONS TO REVERSE THE GRANTS OF SUMMARY JUDGMENT WERE CORRECT AND SHOULD BE AFFIRMED

The Ninth Circuit's decisions in *Edo v. GEICO Casualty Co.* and *Burr v. Safeco Insurance Co. of America* should be affirmed because they correctly determined that the defendant insurance companies in those cases were not entitled to summary judgment on the plaintiff consumers' claims that the "adverse action" policies that resulted in Messrs. Edo and Burr and Ms. Massey not being sent "adverse action" notices failed to comply with the requirements of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*

In Mr. Burr's and Ms. Massey's cases, petitioner Safeco Insurance Company of America and its related companies ("Safeco") did not consider that Safeco had taken an "adverse action" against these consumers under § 1681a(k)(1)(B)(i), when different Safeco companies quoted them an insurance premium that was higher than the premium that the company would have quoted if their credit information had been better, because the particular company had never quoted an insurance premium to Mr. Burr or Ms. Massey before, and Safeco had concluded that it did not need to send "adverse action" notices when it made an initial quote to a new customer.

In Mr. Edo's case, petitioner GEICO Indemnity Company and its related companies ("GEICO") did not consider that GEICO had taken an "adverse action" under the same provision, § 1681a(k)(1)(B)(i), because, when GEICO compared the automobile insurance premium that its

underwriting formula determined was appropriate for Mr. Edo (based, in part, on his credit score) to the premium that would have been charged to someone who had what GEICO considered to be an "average" credit score, the premium using his actual credit score was the same.

Each of these decisions that an "adverse action" within the meaning of the FCRA had not occurred – and that therefore an "adverse action" notice need not be sent – was based on the insurance companies' respective interpretations of the extent of their obligations under the FCRA. In particular, the decisions were based on the insurance companies' respective policies or practices as to what circumstances required that an "adverse action" notice be sent to a customer or prospective customer, informing him or her that the insurance company's use of the person's credit information had adversely affected the premium the customer would be charged.

In each case, the trial court granted summary judgment for the insurance company defendants because it concluded that the insurance companies' interpretations of their obligations under the FCRA were correct.

The Ninth Circuit reversed the grants of summary judgment on the basis that the insurance companies' interpretations of their obligations under the FCRA were inconsistent with the plain language of the statute. *See Reynolds v. Hartford Financial Services*, 435 F.3d 1081, 1092-93, 1097-1100 (9th Cir. 2006); *Spano v. Safeco Corp.*, 140 Fed. Appx. 746, 747 (9th Cir. 2005). It also concluded that, because some of the proffered interpretations were "implausible," the cases should be remanded to the trial court for a determination of whether the insurance companies'

respective failures to comply with the FCRA's "adverse action" requirements were "willful" – thereby triggering the enhanced remedies of § 1681n. *Id.*

On the issue of what could constitute a "willful" failure to comply under § 1681n, the Ninth Circuit said:

> Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in FCRA. Interestingly, there is no legislative history to explain what Congress intended by the use of that term.
>
> We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive."
>
> Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the

policy [or action] contravened those rights." [citing *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3rd Cir. 1997)] We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful.

* * *

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate

purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

435 F.3d at 1097-99 (citations and footnotes omitted).

Petitioners and the insurance industry amici that support their position paint the Ninth Circuit's decision as "expansive and unprecedented," Brief for Petitioners in 06-100 ("Safeco Br."), at 1, "eccentric and wrongheaded," Brief of Mortgage Insurance Companies of America as Amicus Curiae in Support of Petitioners in 06-82, 06-84, 06-100 and 06-101 (Aug. 21, 2006), at 4, and inconsistent with what they describe as "twenty years of settled judicial interpretation" by federal courts of appeals that a "willful" failure to comply with any of the FCRA's requirements can be demonstrated only with evidence that the failure to comply was "knowing," *see* Safeco Br. at 27.

By contrast, the United States agrees with the Ninth Circuit that "reckless disregard" for whether a chosen interpretation of the FCRA's requirements violates the rights of affected consumers can support a finding of willfulness under § 1681n. *See* Brief of the United States as Amicus Curiae in Support of Vacatur in No. 06-84 and Reversal in 06-100 ("United States Br."), at 8-20. The United States asserts, however, that the standard for "reckless disregard" that the Ninth Circuit described is incorrect because it is too close to a negligence standard. *Id.* at 20-24.

The Amici State Insurance Commissioners urge the Court to affirm the Ninth Circuit because its construction of the FCRA provisions at issue in these cases was correct under the law and because the standards it adopted will more effectively implement Congress' intent that users of consumers' credit information act in ways that "assure compliance," 15 U.S.C. § 1681m(c), with the statute's requirements.

A. This Court Has Long Held That "Willful" Violations of Civil Statutes Encompass Both "Knowing" Noncompliance and "Reckless Disregard" for Whether One's Conduct Complies With a Statutory Obligation

Nearly twenty-two years ago, this Court concluded that the enhanced remedies that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, provides for "willful" violations of that statute – *i.e.*, double damages – could be triggered when a defendant acted either knowing that its conduct violated the ADEA or in reckless disregard of whether its conduct violated the statute. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 11 (1985).

Three years later, the Court again concluded that the use of the word "willful" in a civil statute – in that case, the statute of limitations provision in the Fair Labor Standards Act, 29 U.S.C. § 255(a) – encompassed both knowing and reckless conduct. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). The Court said:

> In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional." See Roget's International Thesaurus § 622.7, p. 479; § 653.9, p. 501 (4th ed. 1977). The word "willful" is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of

> whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the [Fair Labor Standards] Act.

486 U.S. at 133.

In the face of these two decisions by this Court on what can constitute a "willful" violation of other civil statutes, the Ninth Circuit's determination that the use of the term "willfully" in § 1681n of the FCRA encompasses both knowing and reckless conduct is neither unprecedented nor extreme. This Court decided *Thurston* in 1985. To the extent that there have been courts of appeals that have limited the scope of "willful" noncompliance with the FCRA's requirements to knowing noncompliance in the last twenty years, as petitioners argue, those decisions have ignored this Court's decisions in *Thurston* and *Richland Shoe.*

Even if the Court were to look at the context of the other provisions of the FCRA to see if Congress intended a different meaning for the word "willfully" in § 1681n, *see, e.g., United States v. Murdoch*, 290 U.S. 389, 395 (1933) ("willful" must be interpreted in the context of the statute's other provisions), there are no fewer than four other places in the FCRA where Congress expressly required that conduct be "knowing and willful" or "knowing" to trigger some civil or criminal consequence. *See* 15 U.S.C. §§ 1681n(a)(1)(B), 1681q, 1681r, 1681s(a)(2)(A). By limiting enhanced liability under § 1681n(a)(1)(A) – the provision at issue in these cases – to "willful" failure to comply, Congress plainly intended something less than the "knowing" standard that petitioners espouse. The Ninth Circuit's decision correctly recognized this and should be affirmed.

B. The Ninth Circuit's "Reckless Disregard" Standard Does Not Permit the Enhanced Remedies of Section 1681n For Conduct That Is Merely Negligent

Petitioners and the United States assert that the Ninth Circuit's standard for what could constitute a "reckless disregard" for a credit information user's obligations under the FCRA was too lax and would impose enhanced liability for conduct that is merely negligent. The Ninth Circuit, however, properly recognized that "willful" noncompliance must be more than mere negligent noncompliance. Its elaboration of what types of conduct *could* constitute 'willful" noncompliance – thereby meriting further development of a factual record in the trial court – demonstrates that it was, in fact, limiting its "reckless disregard" standard to purposeful conduct directed at adopting indefensibly restrictive interpretations of a credit information user's obligations under the FCRA.

To be sure, this Court has previously rejected a standard for "reckless disregard" of a defendant's statutory obligations that would impose liability if the defendant acted without a reasonable basis for believing that it was complying with the statute. *McLaughlin v. Richland Shoe Co.*, 486 U.S. at 134-35. The Court said that such a standard would "permit a finding of willfulness to be based on nothing more than negligence." *Id.* at 135. But the Ninth Circuit did not adopt such an "acting without a reasonable basis" standard.

Rather, the Ninth Circuit made clear that a finding of "reckless disregard" could be based on conduct it described as follows:

> Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse

> incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute. . . .
>
> A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

435 F.3d at 1099. A credit information user who purposely relies on "creative lawyering" to provide "creative" but "indefensible" answers to questions about the extent of the user's obligations under the FCRA is not acting negligently. It is not merely acting without a reasonable basis for believing that its conduct complies with the statute. It is acting in conscious or reckless disregard of what the statute objectively

requires. Such a standard is not too lax for "reckless disregard" and does not expose a credit information user to the enhanced remedies of § 1681n for conduct that is merely negligent.

C. The Ninth Circuit Correctly Determined That GEICO's Policy of Comparing the Premium to be Charged After Considering a Consumer's Credit Score With the Premium That Would Be Charged Someone With an "Average" Credit Score Cannot Be Justified Under the FCRA

GEICO's petition also raises the issue of whether the Ninth Circuit erred in determining that GEICO's adverse action notice policy – in place between 1999 and 2002 – violated the FCRA. Under that policy, GEICO sent an "adverse action" notice only to a consumer whose insurance premium, which GEICO calculated in part by considering the person's credit score, turned out to be higher than the premium that would have been charged if the person had what GEICO considered to be an "average" credit score.

In rejecting this "adverse action" policy as plainly inconsistent with the requirements of the FCRA, the Ninth Circuit explained:

> The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice

> to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.
>
> FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's.

435 F.3d at 1092-93.

This decision is plainly correct. The FCRA requires that an "adverse action" notice be sent to any consumer whose insurance premium is adversely affected by the insurance company's use of his or her credit information. There is absolutely no basis in the statute for a policy that reduces the number of "adverse action" notices to be sent to consumers by artificially comparing the premium a consumer was actually charged after considering his or her credit score and the premium he or she would have been charged if he or she had an "average" credit score.

II. THE POLICY OF CONSUMER PROTECTION UNDERLYING THE FCRA REQUIRES A LIBERAL INTERPRETATION OF "WILLFUL NONCOMPLIANCE"

A Congressional policy of consumer protection lies at the heart of the FCRA, which was expressly enacted to fulfill "a need to ensure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681; *see also St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 883 (5th Cir. 1989) (FCRA the product of Congressional concern over abuses in the credit reporting industry). This need has only become greater over time, as the use of consumer credit information has expanded dramatically beyond the banking system to affect consumers in such critical areas as insurance, employment, and housing. *See, e.g.*, Michael Epshteyn, *The Fair and Accurate Credit Transactions Act of 2003: Will Preemption of State Credit Reporting Laws Harm Consumers?*, 93 Geo. L.J. 1143, 1150 (2005).

As one commentator has put it:

> [T]he FCRA provides a comprehensive system for regulating the dissemination and use of credit information, addressing both the permissible activities of those who utilize credit information as well as their responsibility to ensure the accuracy of the data they employ. The system is not without tension, however, between the needs of consumers, who are the primary subjects of the credit reporting system (but not its principal paying customers), and the requirements of the

> lenders, furnishers, and credit bureaus, who rely on the system for their day-to-day business operations. Consumers' paramount concern is likely to be the accuracy of their files, especially given the significance of credit reports in securing loans, housing, and employment. By contrast, creditors and credit reporting agencies, who deal with millions of credit reports each day, might be willing to sacrifice some measure of accuracy in exchange for speed and low cost.

Id. at 1149-50.

The cost of inaccuracies in credit reports is high for consumers, who may be denied products or services altogether on the basis of inaccurate information, or who may be subject to higher rates for products and services, like insurance, that are priced based on some calculated perception of the consumer's risk ("risk-based pricing"). *See* Fed. Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 (2004) at 11.

A case in point is that of James Fry, a Delaware citizen who contacted the Insurance Commissioner after receiving notice of a proposed annual increase in his homeowner's insurance premium that he believed to be inordinately high. *See* Del. Ins. Commr. and Dept. of Ins. Press Release, Oct. 25, 2005, *available at* http://www.state.de.us/inscom/departments/news/102405-Press-Hartford.shtml. When Mr. Fry asked the insurance company for an explanation of the rate increase, he was told that $43 of the $226 increase was a result of expanded coverage. The remainder, he was told, was the result of his having been placed in a higher-priced

"rating tier" based on his credit score. *Id.* After investigation, it was discovered that the insurance company had not correctly used its own credit scoring formula in Mr. Fry's case. *Id.* While the company had used negative credit factors to assign policyholders to a higher risk category, it was failing to use the positive factor of not having any outstanding credit card or loan balances to assign policyholders to a lower risk category. *Id.* Mr. Fry had no outstanding balances on his credit report, but this fact was not counted in his favor when his rate was calculated. *Id.* He ultimately received a $180 credit for the premium he overpaid as a result of the flawed calculation. *Id.* Moreover, approximately 1,400 other policyholders in Delaware received credits or refunds totaling $135,000 from the same insurer to correct errors resulting from incorrect use of their credit scores. *Id.*

Because the FCRA was enacted with the goal of protecting consumers like Mr. Fry and promoting the accurate and responsible use of their credit information, the provisions of the Act should be interpreted liberally in favor of providing consumers with the requisite notice when the prices they are being charged or quoted are adversely affected because of their credit information. *See Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 964 (6th Cir. 1998); *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Accordingly, the Court should interpret § 1681n to impose a burden of compliance on users of consumer credit information that is commensurate with the expansive and "vital role," 15 U.S.C. § 1681(a)(3), they now play in both the national economy and the lives of individual consumers. "Willful" noncompliance within the meaning of § 1681n should be held to include not only policies or actions that knowingly contravene consumers' rights under the FCRA, but also policies or actions that recklessly disregard those rights. *See Reynolds*, 435 F.3d at 1098-99 (citing *Cushman*, 115 F.3d at 227).

III. THE FCRA SHOULD BE CONSTRUED TO PROVIDE APPROPRIATE INCENTIVES FOR USERS OF CREDIT INFORMATION TO RESPECT AND PROTECT THE RIGHTS OF CONSUMERS

The Congressional statement of purpose in the FCRA recognizes the danger that fairness and equity to consumers will be subjugated to the enormous commercial demand for consumer credit and other personal information. *See* 15 U.S.C. § 1681(b). To prevent the information needs of businesses from taking precedence over the personal needs of consumers, Congress required consumer reporting agencies to "adopt reasonable procedures" for assuring compliance "with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." *Id.*

Such a burden is particularly necessary with regard to the requirement of providing an "adverse action" notice to consumers when the prices they are being charged or quoted have been adversely affected by their credit information or their credit score. Although, as in Mr. Fry's case, an unusual increase in an insurance premium and a determined consumer may bring errors or noncompliance to light, noncompliance with the "adverse action" notice requirements will more typically be difficult to identify because, by definition, those consumers affected by a credit user's noncompliance will *not* have received a notice.

Petitioner Safeco argues, however, that, in requiring the adoption of merely "reasonable" procedures, Congress intended to impose nothing more than a negligence standard on any violator of the FCRA who is not a "true malefactor." Safeco's Br. at 32-33. It argues that the Ninth Circuit's

decision would impose the enhanced remedies of § 1681n on "companies that simply guess wrong" about the scope of their obligations under the Act. *Id.* at 33. This view is incorrect.

First, the Ninth Circuit made clear that a defendant would not be liable under § 1681n "if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute." 435 F.3d at 1099.

Second, and perhaps more importantly, the "grave responsibilities" that Congress concluded credit reporting agencies and users of consumer credit information bear to act fairly and to respect the rights of consumers plainly do not permit these sophisticated commercial enterprises to "guess" about the scope of their obligations under the FCRA. The strong language Congress chose to describe how credit reporting agencies and users of credit information might protect themselves from liability demonstrates that Congress intended to impose a burden on these businesses that was commensurate with their "grave responsibilities" of fairness, accuracy and respect for consumer rights. Thus, consumer reporting agencies are required to follow reasonable procedures "to assure maximum possible accuracy." 15 U.S.C. § 1681e(b). A user of credit information can be excused for failure to send the required "adverse action" notice if it demonstrates that it had reasonable procedures in place "to assure compliance" with the requirements of the statute. *Id.* § 1681m(c). Congress did not say "reasonable procedures to promote substantial compliance." It said "to assure compliance." Guessing is not allowed.

Over the three decades since the enactment of the FCRA, the Act's promise of fairness and equity to consumers in the credit reporting process has not been fulfilled. Studies designed to evaluate rates of error in consumer reports have consistently shown that failure to comply with the FCRA's requirements concerning the fair and accurate reporting and use of consumer credit information is a serious and ongoing problem. For example, a study conducted by the U.S. Public Interest Research Group in 2004 found that one in four (25%) of the consumer reports surveyed contained "serious" errors that could result in the denial of credit or other adverse consequences. *See* Fed. Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 (2004) at 23. Over half (54%) of the consumers responding to the survey reported finding inaccurate personal identifying information in their reports, including name misspellings, incorrect birth dates, out-of-date addresses listed as current, and incorrect addresses. *Id.* Over a fifth (22%) of consumers reported that a mortgage or other loan appeared twice. *Id.* Almost a third (30%) said that their reports listed as open an account that they claimed had been closed. *Id.* In all, nearly eight in ten (79%) of the consumer reports surveyed contained an error of some kind. *Id.*

Abuses and inaccuraeies in the credit reporting system remain rampant. In light of the persistence of such abuses and inaccuracies, the FCRA should be interpreted to create appropriate incentives for the users of credit information to treat consumers fairly, use and report their credit information accurately and responsibly, and adopt policies and procedures that will assure compliance with the statute. The Ninth Circuit's decision does that – in ways that are consistent with Congress' purpose and intent in enacting the FCRA.

Exposing those whose chosen policies or actions recklessly disregard the rights of consumers to damages for willful noncompliance under § 1681n will motivate compliance and encourage credit information users to maintain the proper balance between their business needs and the needs and rights of consumers. This motivation is especially important given the tremendous imbalance of power, sophistication and resources that exists between the businesses that sell and use consumer credit information and individual consumers. Balancing the needs of credit information users and the rights of consumers in an economic environment in which the resources of credit information users greatly exceed those of individual consumers requires placing a high burden on information users to "exercise their grave responsibilities," 15 U.S.C. § 1681(a)(4), in compliance with the FCRA.

CONCLUSION

For the reasons stated above, the decisions of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

PATRICK T. RYAN
Counsel of Record
ANNEMARIE BRIDY
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP
123 SOUTH BROAD STREET
PHILADELPHIA, PA 19109
(215) 772-1500

Attorneys for Matthew P. Denn,
Insurance Commissioner of Delaware

GARY M. COHEN
General Counsel
CALIFORNIA DEPARTMENT
OF INSURANCE
45 Fremont Street
San Francisco, CA 94105
(415) 538-4010

JEANIE KUNKLE VAUDT
Assistant Attorney General
IOWA INSURANCE DIVISION
330 MAPLE STREET
DES MOINES, IA 50319-0065
(515) 281-5705

JOHN W. CAMPBELL
General Counsel
KANSAS INSURANCE
DEPARTMENT
420 SW 9th Street
Topeka, KS 66612-1678
(785) 296-7806

JOHN H. CLOUGH
General Counsel for the
Insurance Division
NEW MEXICO PUBLIC REGULATION
COMMISSION
P.O. Box 1269
Santa Fe, NM 87504-1269
(505) 827-1209

MICHAEL W. RIDGEWAY
General Counsel
OKLAHOMA INSURANCE
DEPARTMENT
P.O. Box 53408
Oklahoma City, OK 73152
(405) 521-6654

ROB MCKENNA
Attorney General
CHRISTINA BEUSCH
Assistant Attorney General
Counsel for the Washington
State Insurance Commissioner
P.O. Box 40100
Olympia, WA 98504-0100
(360) 664-3801

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SAFECO INS. CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* MORTGAGE INSURANCE COMPANIES OF AMERICA AND CONSUMER MORTGAGE COALITION IN SUPPORT OF PETITIONERS

Jeremiah S. Buckley
Joseph M. Kolar
Matthew P. Previn
BUCKLEY KOLAR LLP
1250 24th Street, N.W.
Washington, D.C. 20037
(202) 349-8000

Thomas M. Hefferon
Counsel of Record
Richard M. Wyner
Joseph F. Yenouskas
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
(202) 346-4000

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INTEREST OF *AMICI CURIAE*[1]

Mortgage Insurance Companies of America (MICA) and Consumer Mortgage Coalition (CMC) represent the interests of companies that issue mortgage insurance and make mortgage loans, respectively. Their members, accordingly, play a leading role in facilitating homeownership in America. Because both the premium charged for mortgage insurance and the terms of mortgage loans may depend in part on information about the potential homeowner's creditworthiness, the members of MICA and CMC – and the cause of expanded homeownership that they serve – have a strong interest in the Fair Credit Reporting Act (FCRA) issues presented in these cases.

MICA is a trade association that represents the private mortgage insurance industry in the United States. Its members provide private mortgage insurance to mortgage lenders that protects the lender if the homeowner defaults on the loan. Mortgage insurance allows those lenders to make low-downpayment loans, thereby expanding homeownership opportunities and enabling millions of Americans to become homeowners. The private mortgage insurance industry insures over five million mortgages nationwide.[2]

CMC is a trade association of national mortgage lenders, servicers, and service providers. Those lenders make mortgage loans to Americans when they purchase or refinance homes; collectively, CMC's members make or are involved in facilitating millions of home loans each year.

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[1] Written consents of all parties have been filed with the Clerk of Court. This brief was authored solely by counsel for MICA and CMC, and no person or entity other than MICA and CMC, their members, or their counsel made any monetary contribution to the preparation or submission of the brief.

[2] All but one of the seven predominant companies in the industry are members of MICA.

CMC is committed to the proper interpretation and application of consumer mortgage laws and regulations, in order to foster homeownership through efficient and effective lending practices.

Members of MICA and CMC have been named as defendants in numerous putative class actions brought under FCRA.[3] These cases generally concern statutory questions of first impression and seek an award of unlimited statutory and punitive damages for an alleged willful violation of the Act's requirements. The Ninth Circuit's decision on certiorari here casts a dark shadow both over those many cases and over *amici*'s practices and procedures. For all of these reasons, MICA and CMC have a substantial interest in the outcome of the cases under review.

SUMMARY OF ARGUMENT

The Ninth Circuit launched from the erroneous premise that FCRA is a one-sided consumer protection statute where imposing more burdens and greater liability on business are presumptively favored. To the contrary, the Act affirmatively seeks to promote the nation's strong interest in the efficient flow and use of consumer information – an interest that is vitally important to the housing industry as well. Congress thus adopted a balanced approach that carefully limits both the availability of damages and the Act's notice requirements, in order to avoid undue interference with the flow and use of consumer information. The Ninth

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[3] See, *e.g.*, *Glatt v. PMI Group, Inc.*, No. 2:03-CV-00326-JES (M.D. Fla.); *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky.); *Preston v. Mortgage Guar. Ins. Corp. of Milwaukee*, No. 5:03-CV-111-Oc-10GRJ (M.D. Fla.); *Price v. United Guar. Residential Ins. Co.*, No. 3:03-CV-2643-R (N.D. Tex.); *Portis v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-300 (N.D. Ill.); *Brantley v. Republic Mortgage Ins. Corp.*, No. 04-CV-805 (D.S.C.); *Karwo v. CitiMortgage, Inc.*, No. 04-CV-1944 (N.D. Ill.); *Frye v. Chase Home Mortgage Corp.*, No. 05-825 (W.D. Ky).

Circuit's faulty interpretations of the Act's standard for imposing statutory and punitive damages and of its adverse action notice provisions contravene the balance that Congress struck and should be reversed.

The Ninth Circuit's distorted interpretation of the test for statutory and punitive damages is not just wrong, but would impose grave and unjustifiable burdens on mortgage lenders and insurers and, indirectly, on prospective homeowners. That diffuse and wholly subjective standard would afford no reliable protection to companies subject to the Act and would drive them to adopt overly cautious approaches to the use of consumer information. That effect would be especially powerful both because mortgage lenders and mortgage insurers engage in millions of transactions annually, thereby potentially exposing them to massive damages under the ruling below, and because many issues concerning the application of FCRA to mortgage loans and mortgage insurance remain unanswered. The result would be a restricted flow of consumer information, a consequent decline in the use of such information in ways that help consumers, and a sharply reduced availability of the kinds of risk-priced mortgage loans and mortgage insurance that facilitate homeownership.

The Ninth Circuit's interpretations of the adverse action provisions are likewise both wrong and dangerous. Not only does the Act not require a company to try to compare a consumer to the hypothetical most creditworthy billionaire, but – as an even more basic threshold matter – the duty to give notice upon an "increase" in a charge plainly does not apply to an *initial* charge for a new loan or mortgage insurance policy. The Ninth Circuit's contrary readings would impose needless burdens on users of credit information and cause unnecessary confusion for consumers, all contrary to the Act's goals. This Court, in any event, should limit its ruling on the meaning of adverse action to the particular facts at issue here. Consumer information is used in different ways by different industries, depending on their unique facts

and circumstances. The mortgage industry, for example, does not use consumer information in the same way as petitioners. These variations strongly counsel against broad pronouncements, particularly given the plethora of litigation pending against *amici*'s members and other companies.

ARGUMENT

I. FCRA IS A BALANCED STATUTE THAT SHOULD BE INTERPRETED IN ACCORDANCE WITH ITS PLAIN LANGUAGE AND EVENHANDED OBJECTIVE, NOT BY SUBSERVIENCE TO AN ALLEGED "CONSUMER PROTECTION" PURPOSE

The Ninth Circuit's decision is grounded on the erroneous premise that FCRA should be interpreted in a lopsided manner because "FCRA is a consumer protection statute." 435 F.3d at 1092. The court specifically pointed as justification for its rulings that the outcomes advanced "the statutory mandate of ensuring that consumers are notified when their credit information has been used against them." *Id.* at 1099; see also *id.* at 1091-92 ("Congress sought to promote the rights of consumers"). From that foundation, the court determined, *inter alia*, that (i) adverse action notices must be sent as to new insurance policies, (ii) the statute is triggered even where the consumer's policy rate is no worse than if her credit information had not been used, (iii) the statute is triggered even where there is no credit information on the consumer at all, (iv) companies not even involved in underwriting and rate setting could be held liable, and (v) willfulness could rest on proof of mere reckless disregard of the law and could be shown by evidence that the legal compliance advice was too "creative" for the taste of a court or jury.

The Ninth Circuit's basic premise was faulty and led the court to the wrong results. As we now show, (A) Congress recognized and sought to promote a strong federal interest in the free and efficient flow of consumer infor-

mation, and (B) FCRA codifies a balanced and evenhanded approach designed to avoid undue interference with that strong interest.

A. FCRA Seeks to Promote the Efficient Flow and Use of Consumer Information by Businesses, Which is Vital to the Housing Industry in Particular and to the Economy as a Whole

Recent advances in technology have dramatically affected the consumer reporting industry.[4] The computerization of records, development of the Internet, and ability to transmit data electronically have enabled the timely flow of information about consumer accounts to consumer reporting agencies, and then from those agencies to numerous kinds of entities whose operations are enhanced by the use of that information.[5]

This flow of consumer information among businesses is vital to the United States economy. In passing FCRA, Congress found that our "banking system is dependent upon fair and accurate credit reporting." 15 U.S.C. § 1681(a)(1). It also further found that consumer reporting agencies "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." *Id.* § 1681(a)(3). In short, "Congress enacted the FCRA in 1970 to," *inter alia*, "promote efficiency in the Nation's banking system ...." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

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[4] S. Rep. No. 185, 104th Cong., 1st Sess. 18 (1995) ("the credit reporting industry has grown in the wake of information technology advances that have occurred over the last twenty years").

[5] R. Avery *et al.*, An Overview of Consumer Data and Credit Reporting, Federal Reserve Bulletin at 49 (Feb. 2003) (estimating that each consumer reporting agency receives more than two billion items of information each month) (www.federalreserve.gov/pubs/bulletin/ 2003/0203lead.pdf).

FCRA facilitates and encourages the efficient flow of consumer information in multiple ways. Congress authorized consumer reporting agencies to disclose consumer information to various public and private entities in numerous circumstances. 15 U.S.C. § 1681b. It directed companies that maintain information about consumer accounts to furnish such information to consumer reporting agencies in an accurate manner. *Id.* § 1681s-2. Congress also preempted state laws that interfere with FCRA's key provisions. *Id.* § 1681t(b).

The nationwide system created by Congress provides considerable benefits to business and consumers alike. The Federal Trade Commission (FTC) has noted that "[t]his flow of information [permitted under FCRA] enables credit grantors and others to make more expeditious and accurate decisions, to the benefit of consumers."[6] Among the benefits conferred by the rapid sharing of consumer information are nearly instantaneous qualification for mortgage, automobile, and retail credit, higher levels of home ownership, and increased availability of non-mortgage credit for low-income households.[7] According to Congress, these benefits have saved consumers as much as $100 billion annually.[8]

B. In Recognition of that Strong Interest, FCRA Codifies A Balanced Approach Designed to Avoid Undue Interference with the Flow and Use of Consumer Information

Given Congress's strong interest in promoting the flow and use of consumer information by business, the Ninth Circuit fundamentally erred in construing FCRA so as to

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[6] Federal Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, at 1 (Dec. 2004) (www.ftc.gov/reports/facta/041209factrpt.pdf).

[7] H. Rep. No. 263, 10th Cong., 1st Sess. 23 (2003).

[8] *Id.*

promote a one-sided policy of consumer protection. FCRA "seeks to *balance* the needs of consumers and businesses" with respect to the use of consumer information. S. Rep. No. 209, 103rd Cong., 2d Sess. (1993) (emphasis added); see also *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045 (7th Cir. 2005) (FCRA is an "attempt to achieve this balance between consumer privacy and the needs of a modern, credit-driven economy"); *Equifax Inc. v. FTC*, 678 F.2d 1047, 1049 n.3 (11th Cir. 1982) ("Congress made clear that FCRA was intended to be a balanced regulatory scheme").

The adverse action and civil liability rules are emblematic of this balance. While notice of adverse action is required in a variety of circumstances, it may be given in oral, written or electronic form; it need not be given contemporaneous with the action itself; it need only refer the consumer to the appropriate consumer reporting agency for further information; and FCRA does not require the creditor or insurer to explain the decision or adverse action in detail. 15 U.S.C. § 1681m(a). The civil liability provisions also are measured in certain respects. Unlike many aspects of federal laws regulating consumer transactions, FCRA is not a strict liability statute.[9] No liability arises under FCRA for innocent or non-negligent violations (15 U.S.C. §§ 1681n, 1681o), nor is there a private right of action attached to several of its provisions (*id.* §§ 1681d(c), 1681g(e)(7), 1681m(h)(8)(A), 1681s-2(c)).[10] On the other hand, unlike most federal stat-

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[9] Compare 15 U.S.C. § 1640 (Truth in Lending Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act); 15 U.S.C. § 1693m (Electronic Funds Transfer Act); 15 U.S.C. § 1667d (Consumer Leasing Act); 15 U.S.C. § 2310(d) (Magnuson Moss); 15 U.S.C. § 1691e (aspects of Equal Credit Opportunity Act); 12 U.S.C. § 2605(f) (aspects of Real Estate Settlement Procedures Act).

[10] Congress repealed the private right of action for liability under FCRA § 1681m when it enacted the Fair and Accurate Credit Transactions Act on December 4, 2003. Pub. L. No. 108-159, as

utes regulating consumer transactions involving credit and insurance, uncapped statutory and punitive damages are available for a willful violation of FCRA. *Id.* § 1681n.[11]

In sum, while *amici* certainly acknowledge that FCRA contains protections that benefit consumers, the Ninth Circuit plainly proceeded from an improper premise in assuming that FCRA should be liberally construed in favor of the consumer plaintiff in order "to further its objectives." 435 F.3d at 1092. The proper analysis should recognize that FCRA is a balanced statute, not a one-sided one.

II. THE NINTH CIRCUIT'S DISTORTED INTERPRETATION OF THE STANDARD FOR PUNITIVE AND STATUTORY DAMAGES UNDER FCRA WOULD IMPAIR THE EFFICIENT FLOW OF CONSUMER INFORMATION, CONTRARY TO A CENTRAL GOAL OF THE ACT

Under the decision below, a company can be deemed to have acted "willfully" – and thus ordered to pay massive classwide statutory and punitive damages – if its interpretation of its obligations on an issue of first impression under FCRA is later deemed by a jury, district judge, or appellate court to have been "implausible" or based on "creative lawyering."

As the contrary decisions of other circuit courts show and as petitioners' briefs confirm, the Ninth Circuit's construction is patently wrong under the principles of statutory construction. As we now show, that construction must also be rejected because it would defeat the Act's core balance by sharply impeding the efficient flow and use of consumer information by businesses. This is so because (A) this amor-

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codified in 15 U.S.C. § 1681m(h)(8)(A); see *Perry v. First Nat'l Bank*, 459 F.3d 816, 819-23 (7th Cir. 2006) (so holding).

[11] Compare, *e.g.*, 15 U.S.C. § 1640 (Truth in Lending Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act).

phous and diluted test provides no reliable protection against massive liability and thus would force companies to adopt approaches to consumer information that are excessively cautious; (B) that effect would apply not just to "adverse action" in the context at issue in these cases, but to the Act's many other provisions and across a wide swath of the American economy; and (C) this effect will be especially pernicious because many issues raised by FCRA, a complex and highly technical statute, remain unresolved.

A. The Ninth Circuit's Construction Would Undermine the Act's Goals

A standard under which massive classwide statutory and punitive damages may be awarded based on an after-the-fact appraisal that the company's position on a legal issue of first impression was not sufficiently "tenable," or that its lawyers' advice was too "creative," would defeat rather than promote the Act's core purposes in multiple respects. First, such a subjective and amorphous standard would drive companies to adopt overly cautious policies, thereby sharply constricting the flow and use of consumer information. Companies such as *amici*'s members are faced with a host of obligations under FCRA, both as "users" of information received from consumer reporting agencies and as "furnishers" of information to consumer reporting agencies. 15 U.S.C. §§ 1681b, 1681g(g), 1681i, 1681m, 1681s-2, 1681s-3. There is simply no way that a company can know, in advance, whether its position as to the meaning of any of the multitude of these requirements might later be found to be "implausible," insufficiently "tenable," or "unreasonable" – because those terms are wholly subjective and so provide no guidance to industry. Indeed, the fact that the district court agreed with the defendants' legal position as to adverse action, but that the Ninth

Circuit nevertheless held that its standard for statutory and punitive damages may be met, proves this point.[12]

The Ninth Circuit's standard, thus, would leave businesses with no reliable protection against runaway statutory and punitive damage awards. This is particularly troubling given the fact that many companies engage in millions of transactions affected by FCRA annually (or even monthly) and hence are tempting targets of class action cases seeking massive awards, even in the absence of any actual harm. In *amici*'s experience, companies would be pressured by such a standard to adopt the most cautious possible reading of each of the Act's various requirements. This inevitably would lead to less use, and less efficient use, of consumer information, expensive and unnecessary measures to avoid post-hoc criticism of compliance efforts, and hesitation on other aspects of statutory questions. Those effects, in turn, would defeat the Act's goal of fostering the flow and use of consumer information. In short, driving businesses to adopt the most cautious possible approach eviscerates the statutory balance that Congress enacted.[13]

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[12] Both the rules of statutory construction and constitutional principles render impermissible the kind of vague test for punitive damages adopted by the Ninth Circuit. Under the rule of lenity and similar principles, statutes that authorize punishment, including in the form of punitive damages, must be narrowly construed. See, *e.g.*, 3 N. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 58:4 at 99 (6th ed. 2001) ("[h]ighly regulatory statutes are strictly construed so that those covered by the statute have clear notice of what conduct the statute proscribes"). Due process, moreover, prohibits punishment absent clear advance notice of the proscribed conduct. See, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment") (citation omitted).

[13] This Court in other contexts has rejected statutory interpretations "courting intolerable risks of chilling legitimate"

Second, the Ninth Circuit's interpretation would undermine the attorney-client privilege and, in doing so, would weaken rather than enhance compliance with the Act's substantive requirements. As the Ninth Circuit unabashedly acknowledged, its "reckless disregard" standard will routinely put at issue "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." 435 F.3d at 1099. Indeed, given the risk of catastrophic statutory and punitive damages in nationwide class action cases, mortgage insurers, lenders and other defendants may, as a practical matter, have to disclose the privileged advice they received in an effort to defend themselves. As such, the Ninth Circuit's approach contravenes the strong public interest in protecting attorney-client communications. See, *e.g.*, *Upjohn v. United States*, 449 U.S. 383 (1981); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

The pressure on the privilege arising in FCRA class actions is enormous. FCRA permits the award, in the case of a willful violation, of statutory damages of $100 to $1000 per violation plus punitive damages, all without upper limit, in addition to actual damages and attorneys' fees. 15 U.S.C. § 1681n. The attraction of such a bonanza has led virtually every plaintiff in FCRA class action lawsuits to seek such an award. *Amici*'s members are large institutions, and potential class sizes in cases against them and others are in their industry run into the hundreds of thousands (or even more). As a consequence, it is not unusual that potential liability in FCRA class action cases is in the hundreds of millions of dollars. The Ninth Circuit's cavalier comments that suggest that attorneys should be testifying, and the privilege waived, puts industry participants in an untenable position in these potentially massive lawsuits.

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conduct. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993).

The experience in the lower courts already has demonstrated the pernicious impact of the Ninth Circuit's ruling on the attorney-client privilege. In a case related to the cases at bar, the district court whose rulings were reversed by the Ninth Circuit's decision under review here has recently held that "advice of counsel" is a defense that must be pled, and the privilege waived, if the insurer hopes to defeat the contention that its violation of FCRA was willful. *Ashby v. Farmers Ins. Co. of Oregon*, No. CV 01-1446-BR (D. Or. Feb. 28, 2006) ("The [Ninth Circuit] opinion ... leaves open the possibility, albeit by a small margin, that an insurer might be able to establish it did not act willfully ... if the formulation of the notice was based on advice of counsel."). Further, in *White v. E-Loan, Inc.*, 2006 WL 2850041 (N.D. Cal. Oct. 25, 2006), the court denied the defendant's motion to stay discovery regarding willfulness, pending resolution of the threshold issue of whether FCRA was violated at all, thereby – due to the Ninth Circuit's decision – potentially requiring the defendant to waive attorney-client privilege before the merits are even litigated.

Experience arising from over 100 FCRA class actions filed in the Northern District of Illinois in the last two years alone is also instructive on this point. Those cases concern whether creditors violated FCRA § 1681b in how they made unsolicited "firm offers of credit," as permitted by the statute. In several of those cases,[14] defendants have stipulated to a partial waiver of the attorney-client privilege, faced with plaintiffs' contention that the Ninth Circuit's decision requires such a waiver in order to defend oneself from a will-

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[14] See, *e.g.*, *Murray v. GMAC*, No. 05-CV-1229; *Cerda v. First NLC Financial Services, LLC*, No. 06-CV-0735; and *Hernandez v. CitiFinancial Servs., Inc.*, No. 05-CV-2263.

fulness claim. In short, the dangerous consequences of the Ninth Circuit's ruling are already evident. [15]

Moreover, by putting such advice routinely at issue, the ruling below not only will force disclosure of privileged advice but is likely to discourage clients from seeking, and lawyers from providing, frank and thoughtful advice with respect to FCRA compliance – lest such advice later be used against the client as proof of the kind of "creative lawyering" that, under the Ninth Circuit's approach, justifies the imposition of exemplary damages on a defendant.[16] Alternatively, companies may be well advised to get second and third opinions, hoping that if several lawyers agree the advice might look better to the trier of fact. Rather than motivating companies to "seek objective answers from their counsel as to the true meaning of the statute" (435 F.3d at 1099), the Ninth Circuit's statutory construction would undermine forthright legal advice and true compliance with the Act.

Last, still further problems will arise from the Ninth Circuit's assertion (*id.*) that even consultation with attorneys and reliance on their advice may not suffice to avoid a finding of willfulness if a court concludes in hindsight that the

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[15] Notably, a district judge in that court recently permitted a defendant to seek summary judgment as to willfulness without waiver of the privilege and granted the motion over plaintiffs' objection that the substance of the advice should have been disclosed. *Murray v. HSBC Auto Finance, Inc.*, 2006 U.S. Dist. LEXIS 74128 (N.D. Ill. Sept. 27, 2006). But the controlling legal standard of willfulness in the Seventh Circuit is not the Ninth Circuit's, but instead properly requires the much higher level of proof of intentional misconduct. *Wantz v. Experian Inf. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004).

[16] Compare *Upjohn*, 449 U.S. at 389 (the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice").

lawyers provided "indefensible answers." That holding put clients in the impossible situation of having to second-guess all of their attorneys, still further undermining both the privilege and compliance. It can safely be said that Congress never intended such a result when it enacted Section 1681n.

B. These Untoward Effects Would Be Felt Throughout the Statutory Scheme

Because statutory and punitive damages are available for the willful violation of *any* of the Act's requirements, and because the Act contains numerous requirements that affect a broad swath of the economy, these untoward effects will be particularly sweeping. Except where private suits are barred, FCRA authorizes such an award against "[a]ny person who willfully fails to comply with *any* requirement" of FCRA. 15 U.S.C. § 1681n(a) (emphasis added). That means that these problematic consequences will be felt throughout all of the Act's terms and across the many industries that it impacts.

As noted above, FCRA imposes a variety of substantive duties beyond the adverse action notice provisions that the Ninth Circuit considered. Section 1681b sets forth permissible purposes for which consumer reporting agencies may furnish, and third parties may receive, consumer report information. Sections 1681c, 1681, and 1681i impose requirements with respect to the types of information that a consumer reporting agency may include in a consumer report, how consumer reporting agencies must disclose such information to consumers, and how disputes over accuracy are resolved by such agencies and by information furnishers. Section 1681m imposes duties on users of information in consumer reports in certain circumstances. And Section 1681s-2(b) provides procedures for investigations by entities that furnish consumer information into certain disputes over the accuracy of consumer information.

The Act's provisions also are not limited to the use of credit information, which was at issue in these cases. The

duties imposed by FCRA arise from the use of information in "consumer reports," a term that Congress defined to include not only credit information, but also "any information ... bearing on a consumer's ... character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d)(1). That definition has been construed to include such data as driving record information,[17] social security numbers, and even nicknames.[18]

Thus, the Ninth Circuit's interpretation of the word "willfully," if adopted, would affect much more than just the adverse action notification requirements of Section 1681m that are at issue in these cases. Approximately 250 cases have recently been filed, in courts spread out among many circuits, in which plaintiffs are seeking statutory and punitive damages on the ground that creditors and insurers did not make firm offers of credit or insurance under § 1681b.[19] A number of other class actions contend that creditors or insurers failed to send adverse action notices at appropriate times or challenge the sufficiency of notices that were sent.[20]

The Act's terms, moreover, broadly affect much of the economy. FCRA imposes obligations on consumer reporting agencies, on companies that furnish information to consumer reporting agencies and, in certain circumstances, on users of information contained in consumer reports. Thus,

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[17] See FTC Staff Letter from W. Haynes to M. Halpern, June 11, 1998 (http://www.ftc.gov/os/statutes/fcra/halpern.htm).

[18] See *Yang v. GEICO*, 146 F.3d 1320 (11th Cir. 1998).

[19] See, *e.g.*, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006); *Putkowski v. Irwin Home Equity Corp.*, 2006 WL 741387 (N.D. Cal. Mar. 23, 2006); *Pearson v. Novastar Home Mortgage, Inc.*, No. 05-1377-A (M.D. La. Mar. 28, 2006).

[20] See, *e.g.*, *Broessel v. Triad Guar. Ins. Corp.*; *Brantley v. Republic Mortgage Ins. Corp.*; and *Whitfield v. Radian Guar., Inc.*, all cited in note 3 *supra*.

although petitioners in these cases are personal lines insurers, consumer information is used by a wide array of lenders, retailers, employers, and government agencies.[21]

The same is true throughout the housing industry. First, insurance companies that write homeowners insurance policies frequently use the homeowner's credit scores in determining the premiums for such insurance.[22] Second, most mortgage lenders use the prospective homeowners' credit information in underwriting the risks of mortgage loans and determining the interest rates and other terms for those loans.[23] Finally, credit information may also be used in connection with the private mortgage insurance issued by MICA's members. The premium charged to the lender by the mortgage insurer is based on a variety of factors, including, in certain types of mortgage insurance policies, information contained in the homeowners' consumer reports.

C. The Effects Would be Especially Pernicious Given that Many Issues Under FCRA are Still Unresolved

The damaging impacts from adopting the Ninth Circuit's view that an "implausible" answer to a novel issue justifies an award of unlimited statutory and punitive damages would be particularly powerful because FCRA is a complicated statute with many still-unresolved issues and little regulatory guidance. As is apparent from its text, FCRA is a "complex statutory scheme." *Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003). For example, as directly applicable to these cases, the term "adverse action" is given five

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[21] See S. Rep. No. 209, 103d Cong., 2d Sess. 1-2 (1993).

[22] See, *e.g.*, S. Rep. No. 166, 108th Cong., 1st Sess. 7 (2003).

[23] *Id.*; see also General Accounting Office, Mortgage Financing: HUD Could Realize Additional Benefits from Its Mortgage Scorecard, GAO Report No. 06-435 at 5 (Apr. 2006) (discussing use of automated underwriting of loans using borrower credit scores).

separate meanings by the Act, each of which contains multiple parts. 15 U.S.C. § 1681a(k).[24] For credit transactions, FCRA incorporates another statutory scheme, the Equal Credit Opportunity Act and its governing regulations. Id., § 1681a(k)(1)(A). There is, moreover, relatively little guidance as to the proper interpretation or application of the Act's complicated provisions. The FTC, which has jurisdiction over certain of the Act's provisions, has no general authority to issue substantive rules under the Act (see 15 U.S.C. § 1681s(a)(1), (e); 65 Fed. Reg. 80803 (Dec. 22, 2000)) and, since 2001, has not even issued informal interpretive letters (see http://www.ftc.gov/os/statutes/fcrajump.htm). Revised commentary on FCRA, promised by FTC in early 2003, is still forthcoming. Federal banking agencies have certain regulatory authority for entities they regulate (15 U.S.C. § 1681s(e)), but have not chosen to exercise that authority in many instances. Notably, three years ago, Congress enacted the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. No. 108-159, a lengthy statute that revised many of FCRA's existing provisions and added numerous new statutory terms, but many of the regulations that Congress required for implementing these new provisions have yet to be issued.

Not surprisingly, given the Act's complexity and limited guidance, numerous issues concerning the Act's interpretation and application remain unresolved. In the instant cases, for example, the Ninth Circuit considered, admittedly as a "matter of first impression," whether an initial charge is properly considered an "increase in any charge" and hence can constitute an "adverse action." 435 F.3d at 1090. In rul-

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[24] Because FCRA thus is a highly technical statute, the term "willfully" must be construed as requiring actual knowledge that the law is being violated. See *Cheek v. United States*, 498 U.S. 192 (1991) (tax code); *Ratzlaf v. United States*, 510 U.S. 135 (1994) (currency transactions reporting act).

ing that it is, the court rejected prior district court rulings, including the ones in the cases on appeal.[25] The Ninth Circuit also considered, again for the first time, whether an "adverse action" can have occurred when the use of credit information resulted in the consumer receiving a better rate than if credit information has not been considered at all. On this new issue, too, the appeals court rejected the district court's ruling. 435 F.3d at 1092-93.

Similarly, even the most basic issues relating to the Act's application to mortgage insurance remain unresolved. For example, the duties that apply in the event of an "adverse action" depend in part on which of the five prongs of the "adverse action" definition applies. 15 U.S.C. § 1681a(k). Mortgage insurance arises as part of a credit transaction: when a prospective homeowner seeks credit in the form of a mortgage, the lender as part of that credit transaction obtains mortgage insurance in order to insure against the risk it would face if the borrower defaults on a loan and the value of the home is insufficient to pay the amount of the outstanding mortgage. Because mortgage insurance is an integral part of a transaction in which a consumer is obtaining credit, a reasonable construction is that the so-called "credit" prong applies to mortgage insurance. *Id.* § 1681a(k)(1)(A). Advocates in cases against MICA's members have argued, however, that the definition of adverse action applicable to the "underwriting of insurance" applies instead. *Id.* § 1681a(k)(1)(B)(i). This unresolved question is crucial: if the credit transaction definition applies, a mortgage insurer is not required to send adverse action notices in circumstances where the consumer obtains the product (a loan) that he or she sought. See 16 C.F.R. pt. 698, app. H, pt. I.C ("No adverse action occurs in a credit transaction where the creditor

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[25] See, *e.g.*, *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003).

makes a counteroffer that is accepted by the consumer."), incorporated into 15 U.S.C. § 1681a(k)(1)(A).

Another area of uncertainty concerns whether adverse action notice requirements even apply to mortgage insurers. A federal district court has ruled that mortgage insurers have no duty to send notices because they contract with lenders, not consumers, and because they insure lenders' risks, not consumers' risks. *Whitfield v. Radian Guar., Inc.*, 395 F. Supp. 2d 234 (E.D. Pa. 2005), *appeal pending*, No. 05-5017 (3d Cir.). Another district court has disagreed. *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04CV-00004-JHM (W.D. Ky. Jan. 4, 2006).

In sum, the Ninth Circuit should have recognized – as many courts have – that issues of first impression do not lend themselves to the imposition of punishment or of punitive remedies.[26] Because FCRA presents many such issues, it is particularly important that the decision below be reversed.

III. THE NINTH CIRCUIT ALSO ERRED IN HOLDING THAT GEICO TOOK ADVERSE ACTION WITH RESPECT TO EDO

This Court's grant of certiorari in *GEICO* raises a second question: whether the Ninth Circuit correctly concluded that GEICO took "adverse action" under 15 U.S.C. § 1681m(a) when it issued a policy of automobile insurance to respondent Edo. The decision was premised on the twin con-

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[26] See, *e.g.*, *Harrison v. Allstate Ins. Co.*, 662 So. 2d 1092, 1095 (Miss. 1995) (no punitive damages where "[t]he issue presented in this case is one of first impression in this state" and thus defendant "had no prior notice that its revised policy was contrary to our laws"); *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995) ("Because this is a case of first impression, Carnival did not abrogate any established legal duty toward Flores, and therefore did not exhibit willful and wanton misconduct"); *Morgan Guar. Trust Co. v. American S&L Ass'n*, 804 F.2d 1487, 1500 (9th Cir. 1986).

clusions that the insurance rate was adversely affected by Edo's credit score and that this supposed adverse effect had resulted in an increase in the charge for insurance. The Ninth Circuit erred in both respects, and *amici* write separately to explain why each conclusion is inconsistent with the text and practical realities. Before doing so, however, *amici* address the nature of adverse action notices generally.

Adverse action notices required by FCRA are quite limited. By statute, the notice need only contain two kinds of information. First, the notice must provide notice "of the adverse action." 15 U.S.C. § 1681m(a)(1). Second, it must inform the consumer of the identity of the consumer reporting agency whose consumer report was used; of the right to obtain a free copy of a consumer report from that agency; of the right to dispute anything inaccurate in the report; and of the fact the agency did not make the adverse action decision. *Id.* § 1681m(a)(2), (3). Despite the Ninth Circuit's comments to the contrary, the notice need not explain "the nature of that action" or "how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future." 435 F.3d at 1085.

The bare-bones nature of the statutory requirement is not surprising, in light of the nature of consumer report information in the modern economy. It simply is not practical to require insurers and creditors to *explain* how the use of credit information has affected the consumer. Pricing algorithms are extremely complex. And, more importantly, it is not always clear, sometimes even to the insurer or creditor, why one consumer's credit score is not as favorable as another's. Credit scores (and similar numerical expressions of consumer report information) are often influenced, at least in part, not by the existence or absence of a delinquency or a default but by the number and extent of credit relationships, recent inquiries, and other factors. That is, one's credit score could be lower than another's simply because the consumer has less experience with credit, though that experience has been

positive. While circumstances such as these illuminate why it makes sense for the adverse action notice to merely inform the consumer that an adverse action has been taken, it also means that the notice contains limited guidance.

The benefit of adverse action notices, moreover, has been reduced as a result of the enactment of FACTA. Before FACTA, the adverse action notice had the advantage of triggering for a consumer the right to obtain a free credit report, which the consumer could examine and, presumably, seek to correct. But in FACTA, Congress provided that all American consumers have the right to an annual free credit report. 15 U.S.C. § 1681m(a)(3)(A). The benefit of the adverse action notice process thus has largely disappeared.

Indiscriminately requiring adverse action notices in most credit and insurance transactions would be baffling, off-putting, and counterproductive. Where, as in the case at bar, the consumer believes and understands that she is obtaining the product or service she requested, the notice of "adverse action" is inherently confusing. Individuals who obtained consumer reports might expend considerable time with consumer reporting agencies and entities that provide credit information addressing entries in their consumer reports – not understanding that the reports accurately reported their credit accounts, or that any "errors" in the reports were sufficiently minor that their ability to obtain credit or insurance was not impaired in any material way. Consumers, who had applied for and received a policy of insurance or loan satisfactory to them, might call users who had sent them adverse action notices, puzzled about what "adverse action" they had suffered.

Mortgage insurance presents an even more difficult situation. Mortgage insurance is a default policy for the lender, and so the mortgage insurer does not even have a relationship with the consumer. If adverse action notices were required from a mortgage insurer where an issued

policy was at a less-than-optimal rate, the notice would be confusing in the extreme, coming to a consumer who probably has not even heard of the mortgage insurer and often in connection with a loan that the consumer believed was being made.

For these reasons, and others, it is not surprising that Congress did *not* enact an approach calling for the indiscriminate distribution of adverse action notices in every conceivable situation, but instead drew lines that require notices only where doing so would be useful and would outweigh the various costs. As we now show, the Ninth Circuit's rulings crossed those lines.

A. The Court Erred In Finding That An Adverse Action Notice Was Required

The Ninth Circuit's decision, requiring an adverse action notice, was erroneous because (1) there was nothing adverse to Edo and (2) the issuance of an initial insurance policy was not an adverse action.

1. GEICO had no obligation to send an adverse action notice to Edo when it issued him an initial policy of automobile insurance, because it was undisputed that use of credit report information did not make Edo's policy premium any higher. 435 F.3d at 1093 n.12. The Ninth Circuit nonetheless held that GEICO took "adverse action" because FCRA "requires [adverse action] notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score." *Id.* at 1093. This approach compared Edo with a hypothetical insured – indeed, the most creditworthy insured in the world.

That approach greatly, and erroneously, expands the scope of FCRA. The statute requires a notice where adverse action has occurred "based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a). The plain import of this requirement is to mandate

a notice to Edo only if information in *Edo's* consumer report caused him to get a higher premium rate than he otherwise would have received had his consumer report not been considered. The statute does not by its terms create the duty of notification that compares the debtor or insured with *someone else*. GEICO acted properly in not telling Edo he had been adversely affected, because he had not been.

There are practical and policy reasons why the Ninth Circuit's approach makes little sense. For the consumer, there is little utility in being told that her experience in obtaining insurance or credit is less favorable than it would have been if she was the hypothetically most creditworthy person. The Ninth Circuit's requirement of a notice "whenever a consumer pays a higher rate because his credit rating is less than the top potential score" (435 F.3d at 1093), would send consumers off to study their reports for the often-futile purpose of identifying why they are not the best credit risk – a scenario that Congress simply did not intend.

Underlying the Ninth Circuit's construction of FCRA seems to be the mistaken assumption that every consumer might be eligible for the "best" rate because she might discover errors contained in her consumer reports of sufficient magnitude to result in lower premiums if the errors were corrected. In *amici*'s experience, that simply is not the case for the products they provide: a sub-optimal premium or interest rate, or loan term, is not a reliable indicator of the need for the consumer to investigate her credit report, and there is no basis to conclude that Congress believed otherwise. Likewise, the FTC's expected litigating position supporting the Ninth Circuit should not bolster that court's conclusion. The FTC has no rulemaking authority over the adverse action provisions of FCRA (see 16 C.F.R. § 1.73(a)(2)), and thus its views are not entitled to deference. Moreover, the Commission's current stance is inconsistent with its prior actions. The FTC has never brought any reported FCRA enforcement action in this area against an insurance company even though

such companies historically have not provided such notices.[27] Further, when FCRA was amended in 2003, the FTC supported a draft amendment that would have added a new requirement that insurers send a "Risk Based Pricing Notice" telling consumers that credit might adversely affect premium pricing – an amendment that would have been unnecessary if FCRA's adverse action provisions already required notices under those circumstances.

Finally, the Ninth Circuit argued that its interpretation "best comports" with FCRA's purpose of ensuring "[a]ccuracy and fairness of credit reporting." 435 F.3d at 1091 (citing 15 U.S.C. § 1681). As noted above, however, FCRA has multiple goals and seeks to strike a balance. Requiring that users of consumer notices send out numerous adverse action notices in situations specified by the Ninth Circuit might result in benefits to some, but, as noted above, those benefits are limited and come with the cost of consumer confusion in other instances. Assume, for example, that a consumer's policy of insurance was set for renewal, an insurer obtained consumer report information to evaluate the renewal, and the consumer's credit standing had improved so that a lower premium (but still not the best) was provided at renewal. Because the new premium was not the "best" hypothetical premium available, the insurer would be required to send a notice informing the consumer that he had been provided a new, lower premium – but also that the insurer had taken "adverse action" against him based on information in his consumer report.

In sum, because it was undisputed that Edo's premium was not higher than it would have been if his score had not been used, there was no notice duty in this case.

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[27] Although risk-based pricing of insurance based upon credit reports has evolved over the last decade, other types of consumer reports, such as motor vehicle reports, have been used for many years in pricing insurance.

2. The Court of Appeals also erred in its threshold ruling that "FCRA's adverse action notice requirement appl[ies] to the rates first charged in an initial policy of insurance" and is not "limited to an increase in a rate that the consumer has previously been charged." 435 F.3d at 1090. *Amici* urge the Court to address this initial holding, which finds no support in the plain language of the statute and which if reversed would require reversal of the Ninth Circuit's judgment.

Congress provided a multi-part definition of "adverse action." The part applicable to insurance matters, the "Insurance Prong" of the definition, states as follows:

> The term "adverse action" ...
>
> (B) means –
>
> (i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i). The Ninth Circuit held that there was an "increase" in GEICO's charge for insurance to Edo, even though it had not previously issued him a policy of insurance. The reasons that the court offered for that conclusion do not withstand scrutiny.

First, the court said that the ordinary meaning of the word "increase" is "to make something greater," which it believed should not "be limited to cases in which a company raises the rate that an individual has previously been charged." 435 F.3d at 1091. Yet the definition offered by the Ninth Circuit compels the opposite conclusion. Because "increase" means "to make something greater," there must necessarily have been an existing premium, to which Edo's actual premium may be compared, to determine whether an

"increase" occurred. Congress could have provided that "adverse action" in the insurance context means charging an amount greater than the optimal premium, but instead chose to define adverse action in terms of an "increase." That definitional choice must be respected, not ignored. See *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979) ("[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated").

Next, the Ninth Circuit reasoned that because the Insurance Prong includes the words "existing or applied for," Congress intended that an "increase in any charge" for insurance must "apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy." 435 F.3d at 1091. This interpretation reads the words "existing or applied for" in isolation. Other types of adverse action described in the Insurance Prong apply only to situations where a consumer had an existing policy of insurance, such as a "cancellation," "reduction," or "change" in insurance. Each of these forms of adverse action presupposes an already-existing policy, and under usual canons of statutory construction the term "increase" also should be construed to apply to increases of an already-existing policy. See *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("a phrase gathers meaning from the words around it") (citation omitted).

The Ninth Circuit stated that it was aware of "no sensible alternative reading" of the statute other than its view that the phrase "existing or applied for" modified each part of the definition that preceded it, and permitted adverse action for all types of insurance transactions, including ones where a pre-existing relationship was lacking. 435 F.3d at 1091. However, Congress used the disjunctive in the Insurance Prong, referring to insurance "existing or applied for," and so could have intended that the term "existing" govern certain listed insurance transactions, and "applied for" govern others. Under this reading, the term "existing" would apply to "cancellation," "increase" in charge, "reduction," or "unfa-

vorable change" in terms of insurance -- all terms that presuppose an existing policy. The term "applied for" would govern "a denial" of insurance, in which a consumer lacks an existing relationship with the insurer.[28]

At bottom, the Ninth Circuit view was that FCRA should be construed in whatever manner requires sending more notices. But Congress, well aware that "[m]eaningful disclosure does not mean *more* disclosure" (*Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 243 (2004) (citation omitted)), enacted a more nuanced – and more sensible – statutory scheme. It is well settled that courts must strictly adhere to the terms of legislation that "was the result of compromise between groups with marked but divergent interests." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002); see also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 n.13 (1989) ("[s]trict adherence" to statutory language is required when statute "is the result of a series of carefully crafted compromises"). As we have shown, that is precisely the case with respect to FCRA. Under these circumstances, "the wisest course is to adhere closely to what Congress has written." *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 (1981). Because the Ninth Circuit strayed far from that course, its interpretations of the statute should be corrected.

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[28] Even if the court was right that there can be an "increase" where there was no prior charge, it could only be where an application is made for a policy or loan at a specific rate or charge and that specified rate or charge is increased, based on consumer information, before the sale. See, *e.g.*, Latour-Berger FTC Interpretive Letter (June 28, 2001) (http://www.ftc.gov/os/statutes/fcra/latour.htm). For example, a lender might indicate that it was applying for mortgage insurance at a particular rate but coverage might be granted only at a higher rate due to the consumer's credit profile. Surely, at the very least, there must be a first, lower number applied for before there can be said to have been an "increase" in the charge.

B. The Court Should Limit Its Ruling Concerning The Meaning of The Term "Adverse Action"

Whatever its decision, *amici* respectfully submit that the Court should be careful to limit its decision as to the adverse action issue to the specific factual context presented in the *GEICO* case. Several reasons counsel in favor of such a limited ruling.

Caution in the interpretation of the term "adverse action" is needed because FCRA has a broad regulatory scope. In FCRA, Congress permitted multiple different entities to use consumer information, including in connection with furnishing credit, for employment purposes, with underwriting of insurance, for eligibility for a government license of benefit, valuing the credit or prepayment risks of an existing credit obligation, and in connection with account reviews to assure that a consumer meets the terms of the account. See generally 15 U.S.C. § 1681b(a)(3).

Use of credit information arising from these multiple purposes is not monolithic, and the manner in which one industry uses consumer information will depend on facts and circumstances unique to that industry. For example, private passenger automobile insurers, such as respondent GEICO, offer one product (automobile insurance) and use a "tier" system, under which potential insureds are placed into one of multiple tiers based not only on credit information, but also on driving-related factors such as prior accidents, use of the vehicle, and vehicle type. Mortgage insurers, however, use a different approach, and pricing is impacted by the loan-to-value ratio as well as information about the proposed borrowers.[29] Lenders making mortgage loans offer borrowers a

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[29] Further, some mortgage insurance programs require that there be a credit score in order to issue a policy, unlike certain programs before the Ninth Circuit.

variety of differing loan products depending on a borrower's needs; how the consumer's credit information affects the interest rate offered will depend on a host of other factors relating to the credit product that the consumer has selected. These varied uses of consumer information further underscore the need for a narrow ruling on the term "adverse action."

Strictly limiting the scope of the Court's decision as to the meaning of the term "adverse action" is also vital in light of the stakes involved in FCRA litigation against *amici*'s members, and others. As explained above, creditors and insurers typically use consumer information in a host of different circumstances: in providing quotes to consumers shopping for rates, in evaluating applications, and in reviewing existing accounts. Because of this extensive use of consumer information, and because of FCRA's statutory penalty provision, the potential exists for very significant liability when a defendant's use of credit information is challenged in a class action setting. A narrow ruling on the term "adverse action" will help confine liability to those contexts where it is appropriately placed. *Cf. Fidelity Federal Bank & Trust v. Kehoe*, ___ U.S. ___, 126 S. Ct. 1612 (2006) (Scalia, J., concurring in denial of certiorari) (noting the "enormous potential liability, which turns on a question of federal statutory interpretation," that defendant faced in a class action under the Driver's Privacy Protection Act).

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

Jeremiah S. Buckley
Joseph M. Kolar
Matthew P. Previn
BUCKLEY KOLAR LLP
1250 24th Street, N.W.
Washington, D.C. 20037
(202) 349-8000

Thomas M. Hefferon
Counsel of Record
Richard M. Wyner
Joseph F. Yenouskas
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
(202) 346-4000

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IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR, *et al.*,

Respondents.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONERS

CHRISTIAN RATAJ
NATIONAL ASSOCIATION
OF MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

SHEILA L. BIRNBAUM
Counsel of Record
BARBARA WRUBEL
DOUGLAS W. DUNHAM
ELLEN P. QUACKENBOS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the National Association of Mutual Insurance Companies (NAMIC) is a national trade association representing companies writing property and casualty insurance in every state and jurisdiction of the United States. NAMIC has more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property/casualty insurance premiums in the United States. NAMIC members account for 44 percent of the homeowners market, 38 percent of the automobile market, 39 percent of the workers' compensation market, and 31 percent of the commercial property and liability market. NAMIC benefits member companies through advocacy, public policy and member services. NAMIC regularly appears in judicial proceedings as an amicus to inform courts about the implication of legal developments for their members.

The issues of the interpretation and application of the Fair Credit Reporting Act (FCRA) that are before the Court in the present consolidated cases are of great importance to NAMIC's members. The Ninth Circuit's decision threatens insurance companies and other users of credit information with crushing liability that NAMIC believes is contrary to the statutory language and to Congress' intent in enacting the FCRA.

SUMMARY OF ARGUMENT

The Ninth Circuit's interpretation of key statutory provisions of the FCRA drastically expands the obligations and potential liability of insurance companies and other users of credit information under the FCRA. Under the FCRA, it is a permissible practice for insurance companies to consider

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae NAMIC states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than amicus curiae and their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have given blanket consent to the filing of all amicus briefs in this case, in letters of consent filed with the Clerk of this Court.

a consumer's credit history or other consumer information in making underwriting decisions as to whether to insure a particular risk and at what price. *See* 15 U.S.C. § 1681b(a)(3)(C). However, in certain circumstances described by the statute, an insurer is obliged to notify the consumer when it has taken an adverse action based on the consumer's credit report. The Petitioners in the FCRA class actions now before this Court are alleged to have willfully failed to comply with the statutory adverse action notice requirement. The Ninth Circuit's decision presents critical questions of statutory interpretation regarding the definition of "adverse action" in section 1681a(k)(1)(B)(i) of the Act and the meaning of "willful" noncompliance under section 1681n(a). This *amicus* brief addresses both of these issues.

The FCRA includes a number of civil penalty provisions to penalize violations of or noncompliance with the requirements of the Act. The FCRA establishes different civil penalties for "negligent," "knowing," and "willful" violations, with the most severe civil penalties, reserved for "willful" violations. 15 U.S.C. § 1681n(a). Plaintiffs who establish a willful violation need not show actual damages, but may recover statutory damages of up to $1000 per plaintiff, as well as punitive damages and attorneys' fees. *Id.*

In the decision under review, the Ninth Circuit erroneously held that "willful" noncompliance with the requirements of the Act encompasses not only a knowing and intentional failure to comply, but also "reckless disregard." *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3162 (U.S. Sept. 26, 2006) (No. 06-100). The Ninth Circuit's expansive interpretation of the statutory term "willfully" places an excessive and potentially crushing burden of liability on users and providers of credit information, facilitating and encouraging huge nationwide class actions seeking statutory and punitive damages on behalf of persons who have not suffered any actual damages from the instances of noncompliance they allege.[2]

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[2] For a discussion of the potential for "catastrophic" and "disproportionate" damages in class actions for statutory and punitive

The Ninth Circuit's primary rationale for this ruling was its belief that this Court's decisions on the meaning of "willfulness" in various other statutory contexts establish a rule that the word "willful" when used in civil statutes means reckless, while in criminal statutes the meaning is limited to knowing, intentional conduct. *Id.* at 1098. The existence of such a rule, however, is negated by this Court's decision in *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998), in which the Court held that "willful" as used in section 523(a)(6) of the Bankruptcy Code did not include the meaning "reckless," noting that if Congress had intended that meaning, it could have added the word "reckless" to the statute.

Moreover, this Court has repeatedly emphasized that the word "willful" as used in civil and criminal statutes is "'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citation omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (same). Thus, the Court has indicated that the meaning of the term "willful," whether in civil or criminal statutes, must be determined through a careful analysis of the statutory language, context and purposes. Such an analysis – which the Ninth Circuit failed to perform – demonstrates that the term "willful" as used in the FCRA was intended to encompass only intentional conduct committed with knowledge that the conduct was contrary to the requirements of the Act.

In particular, in the hierarchy of violations and civil penalties created by the FCRA (willful noncompliance, knowing noncompliance, and negligent noncompliance), only willful noncompliance carries the possibility of punitive damages. By holding that willful noncompliance does not require a showing that a defendant acted with knowledge that its conduct was unlawful, but is satisfied by a showing that the defendant acted in "reckless disregard" of the statutory requirements, the Ninth Circuit erroneously has subjected less culpable conduct to the penalties that Congress intended

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damages under section 1681n(a), *see In re Trans Union Corp. Privacy Litigation*, 211 F.R.D. 328, 348-51 (N.D. Ill. 2002).

be reserved for only the most culpable violations of the FCRA.

The Ninth Circuit's incorrect interpretation of "willful" improperly creates a dramatic expansion of liability for statutory and punitive damages under the FCRA that is inconsistent with the purposes of the statute. The FCRA was enacted to regulate and to spur the development of consumer credit markets and the use of credit information -- economic activity that Congress recognized was vital to the national economy and beneficial to both consumers and businesses. The FCRA was also intended to protect consumers by defining the permissible purposes for which a consumer's credit information may be accessed without his or her permission and by establishing procedures to ensure that credit information is accurately reported. The expansion of liability created by the Ninth Circuit's decision impairs the balance struck by Congress as best furthering these statutory purposes.

The Ninth Circuit's interpretation and application of the FCRA's definition of "adverse action" also directly contravenes the plain language of the statute. The relevant portion of the statutory definition of "adverse action" limits the FCRA's notice requirements to "an increase in any charge for . . . any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). Under the Ninth Circuit's broad interpretation, an increase occurs whenever a consumer pays a higher rate because his credit rating is less than the top potential score – even if the consumer in fact obtains insurance rates that are more favorable than those he would have had if his credit information had not been used and even if the consumer is provided insurance at the rate previously quoted to him or her without use of any credit information.

The Ninth Circuit's "top potential score" benchmark for determining whether there has been an increase in the charge for insurance is found nowhere in the language of the FCRA. If sustained, this new definition would require adverse action notices to nearly all purchasers of insurance. The district court's common sense holding that an "increase in any

charge" for insurance cannot occur "unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report"[3] accords with the language of the statute and provides a bright line rule. Alternatively, the procedure adopted by GEICO, under which adverse action notices are provided only to those purchasers who were charged a higher rate than would have been charged had their credit information been neutral, complies with the letter and purposes of the statute.

For these reasons and those set forth below, NAMIC respectfully submits that the Ninth Circuit's decisions in the cases at bar should be reversed.

I. THE NINTH CIRCUIT'S WILLFULNESS STANDARD IS CONTRARY TO THE FCRA'S STATUTORY LANGUAGE AND PURPOSE

A. The Ninth Circuit Erred in Its Interpretation of the Statutory Term "Willful"

The statutory language and context of section 1681a of the FCRA, considered in light of the principles of statutory interpretation established by this Court, require that "willful" noncompliance be interpreted to mean a knowing and intentional failure to comply with the statute. The Ninth Circuit's ruling that "willfulness" encompasses not only knowing and intentional noncompliance with the statute, but also "reckless disregard" of the statute's requirements, *see Reynolds*, 435 F.3d at 1098-99, is incompatible with the statutory language and context, creating enormous, unintended liability for insurance companies and others subject to the FCRA.

The Ninth Circuit's holding that a willful failure to comply encompasses reckless disregard is based upon the incorrect

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[3] *Rausch v. Hartford Fin. Servs. Group, Inc.*, No. CV 01-1529-BR, 2003 WL 22722061, at *2 (D. Or. July 31, 2003), *rev'd sub nom. Reynolds v. Hartford Fin. Servs. Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005), *superseded by* 435 F.3d 1081 (9th Cir. 2006).

contention that this Court's precedents establish the rule that the word "willful" as used in civil statutes includes the meaning "reckless," while in criminal statutes the meaning of the word "willful" is limited to intentional conduct that the defendant knows to be unlawful. *See id.* at 1098. This Court has established no such rule. Indeed, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and the other cases cited by the Ninth Circuit, do not support the criminal/civil distinction drawn by the Ninth Circuit. In *Thurston*, far from adopting such a distinction, this Court's analysis of the meaning of the word "willful" under the Age Discrimination in Employment Act looked to prior decisions construing both civil and criminal statutes. *See id.* at 126-27.

Moreover, this Court has not uniformly construed "willful" in civil statutes to include reckless disregard. In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), for example, this Court expressly rejected that interpretation in construing the word "willful" in section 523(a)(6) of the Bankruptcy Code, a civil provision, which creates an exception from bankruptcy discharge for debts "for willful and malicious injury by the debtor to another." 11 U.S.C. § 523(a)(6). This Court held that the word "willful" indicated "a deliberate or intentional injury." 523 U.S. at 61. In *Kawaauhau*, the Court noted that if Congress had intended a broader meaning, it "might have selected an additional word or words, *i.e.*, 'reckless' . . . to modify 'injury.'" *Id.* The Court also stressed that the "more encompassing interpretation" urged by the plaintiffs in that case would improperly except a wide range of debts from discharge (*id.* at 58) – a result long held to be contrary to the purposes of the bankruptcy statutes.

This Court has repeatedly emphasized that the word "willful" as used in statutes is "'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citation omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (same). Accordingly, in determining the meaning of the word "willful" in both criminal and civil statutes, this Court has looked to principles of statutory construction that require a careful analysis of the language, context and purposes of the statute in question.

In construing the word "willful," this Court has examined both the immediate context in which the word is used and "the complex of provisions in which [it is] embedded." *Ratzlaf*, 510 U.S. at 141. In particular, in determining the meaning of the word "willful," this Court has looked to the word or words that "willful" modifies. *See, e.g., Kawaauhau*, 523 U.S. at 61 ("The word 'willful' in [11 U.S.C. § 523](a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury."). Moreover, in conformity with the rule of statutory interpretation that a "term appearing in several places in a statutory text is generally read the same way each time it appears," this Court has recognized that the word "willful" should not be construed so malleably as to have an individuated interpretation each place it appears or with regard to the different terms, phrases or statutory sections to which it refers. *Ratzlaf*, 510 U.S. at 143.

An analysis of the statutory language following these principles of statutory interpretation demonstrates that "reckless" is not within the possible range of meanings of the word "willful" as used in subsection 1681n(a) of the FCRA. In particular, an analysis of this subsection shows how the context in which the word "willful" is found limits its meaning. Subsection (a) specifies both the damages available generally for willful noncompliance with the requirements of the statute and the damages available specifically for willfully obtaining a consumer report under false pretenses or knowingly without a permissible purpose. *See* 15 U.S.C. § 1681n(a)(1)(A) & (B). Grammatically, subsection (a) consists of a single sentence, the first portion of which introduces and then is completed by a number of paragraphs and subparagraphs listing the available damages.[4]

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[4] Subsection (a) reads in its entirety as follows:

> **(a) In general**
>
> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

The word "willfully" occurs in the introductory portion of subsection (a) ("Any person who *willfully* fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of--"), and, consequently, all of the damages provisions listed in the following subparagraphs are contingent upon a willful failure to comply with the statute.

Thus, under the principles of statutory interpretation discussed above, the word "willfully" in section 1681n(a) must be given a meaning that is compatible with all of the subparagraphs to which it refers. The use of the word "willful" to modify conduct described in subparagraph (a)(1)(B), namely, "obtaining a consumer report under false pretenses or knowingly without a permissible purpose" is, however, clearly incompatible with the meaning of "reckless" attributed to it by the Ninth Circuit.

By its plain terms, a willful failure to comply with the statute as described in subsection (a)(1)(B) must be knowing and intentional, both in the case of willfully "obtaining a consumer report under false pretenses" and in the case of willfully "obtaining a consumer report . . . knowingly without a permissible purpose." First, the words "under false pretenses" clearly describe conduct that is knowingly and intentionally deceptive. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (statutory language making unlawful the use or employment of "any manipulative or

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> **(1)(A)** any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
>
> **(B)** in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;
>
> **(2)** such amount of punitive damages as the court may allow; and
>
> **(3)** in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n(a).

deceptive device or contrivance" strongly suggests that the statute "was intended to proscribe knowing or intentional conduct"). Likewise, the words "knowingly without a permissible purpose" expressly require that the defendant knows that he does not have a permissible purpose under the FCRA for obtaining the consumer report in question.[5] The concept of recklessness is inconsistent with the statutory language "obtaining a consumer report under false pretenses or knowingly without a permissible purpose." To be sure, the words "willful" and "willfully," when used to describe such conduct, must mean deliberate and intentional.

This Court's established principles of statutory interpretation require that "willful" in section 1681n(a) be given this same meaning in reference to other general acts of willful noncompliance to which subsection (a)(1)(A) is applicable. As noted above, when the word "willful" "appear[s] in several places in a statutory text," it is "generally read the same way each time it appears." *Ratzlaf*, 510 U.S. at 143 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)). Moreover, when, as here with the word "willful," a "*single* formulation" is "called into play" with regard to related provisions, there is "even stronger cause" to construe that formulation "the same way each time it is called into play." *Ratzlaf*, 510 U.S. at 143; *see also Clark v. Martinez*, 543 U.S. 371, 380 (2005) (statutory language given a limited construction in one context must be interpreted consistently in other contexts, even though other of the statute's applications, standing alone, would not support the same limitation).

Accordingly, the meaning of "willfully," as defined by its use as a modifier of the clauses "obtaining a consumer report under false pretenses or knowingly without a permissible purpose," applies also to its use to describe noncompliance in general with the statutory requirements. Because "willfully" means deliberately and intentionally with regard to

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[5] Section 1681b of the FCRA, 15 U.S.C. § 1681b, sets forth the permissible purposes for consumer reports.

subsection (a)(1)(B), it cannot mean "with reckless disregard" in reference to subparagraph (a)(1)(A).[6]

In addition, an interpretation of "willfully" as meaning deliberately and intentionally properly reflects and preserves the distinctions between the three different levels of civil penalties established under the FCRA. The FCRA defines and penalizes willful, knowing, and negligent noncompliance with the Act. *See* 15 U.S.C. § 1681n(a) (willful noncompliance); § 1681n(b) (knowing noncompliance); § 1681o (negligent noncompliance). Under the FCRA, willful noncompliance carries the most severe penalties. Willful noncompliance is subject not only to statutory penalties of up to $1000, but also to punitive damages. *See* 15 U.S.C. § 1681n(a)(1) & (2). Knowing noncompliance (which applies only to improperly obtaining consumer reports) is subject to a penalty of the greater of actual damages or $1000, 15 U.S.C. 1681n(b), while negligent noncompliance renders the defendant liable only for actual damages. These three levels of culpability and the hierarchy of penalties clearly recognize that willful noncompliance is deserving of greater condemnation and punishment than knowing noncompliance, and that knowing noncompliance is more serious than negligent noncompliance. The Ninth Circuit's expansion of "willful" noncompliance to include "reckless disregard" improperly subjects conduct of a lesser degree of culpability to the most severe penalties available under the statute. *Cf., e.g., Cocio v. Bramlett*, 872 F.2d 889, 892 (9th Cir. 1989) (the law recognizes that "[i]ntentional acts are more reprehensible than reckless acts. Reckless acts are more serious than negligent acts.") (citing *Solem v. Helm*, 463 U.S.

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[6] This construction of the word willful also accords with standard dictionary definitions. *See, e.g., Merriam Webster's Collegiate Dictionary* 1354 (10th ed. 1994) (defining willful as "obstinately and often perversely self-willed" or "done deliberately: INTENTIONAL"). "Recklessness" is closer to gross negligence. Indeed, as a leading authority on the law of torts has written, there "is no clear distinction at all between ['recklessness'] and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence . . . " William L. Prosser, *The Law of Torts* 185 (4th ed. 1971), *as quoted in Smith v. Wade*, 461 U.S. 30, 73 (1983) (Rehnquist, J., dissenting).

277, 293 (1983)). Construing "willfully" to require deliberate noncompliance with known legal requirements accords with Congress' evident intent to make "willful noncompliance" the most serious, and severely punishable, level of noncompliance with the statute.

Subsection 1681n(b), headed "Civil liability for knowing noncompliance," also provides civil penalties for "obtaining a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose," but does not require that the violation be "willful." 15 U.S.C. § 1681n(b). Significantly, there are no punitive damages for non-willfully obtaining a consumer report. Again, it is evident from the statutory scheme that "willfully" obtaining a consumer report under false pretenses or knowingly without a permissible purpose requires a greater level of culpability than committing the same violation without willfulness. The word "willfully" thus requires more than "false pretenses" and knowledge of unlawfulness, not the lesser degree of culpability embodied in the Ninth Circuit's "reckless disregard" standard.[7]

The FCRA's criminal penalty provision, section 1681q, also bolsters the conclusion that "willful" does not mean "reckless" for purposes of section 1681n. Section 1681q provides criminal penalties for "knowingly *and* willfully obtain[ing] information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q (emphasis added). As in section 1681n, in this context too, the word "willfully" creates a standard of culpability that requires more than mere "knowing," not less. If the Ninth Circuit's interpretation of the word "willfully" were accepted, the phrase "knowingly and willfully" would have the contradictory meaning of "knowingly and at the same time

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[7] An analogous example of Congress' understanding of the terms willfully and knowingly is provided by its amendment of the Endangered Species Act. *See* Endangered Species Act Amendments of 1978, H.R. Conf. Rep. No. 95-1804, at 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9493 (amending penalty provisions of Endangered Species Act to "*reduce*[]" the standard from "willfully" to "knowingly" to facilitate enforcement by eliminating knowledge of the law (required for willfulness) as an element of a violation) (emphasis added).

not knowingly, but recklessly." Clearly, reckless disregard is incompatible with the use of the word "willfully" in section 1681q, where its context again shows it to mean "deliberately and intentionally." Under the rule of statutory construction that a "term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf*, 510 U.S. at 143, the word "willfully" should be given the same meaning in section 1681n that it has in section 1681q. Thus, section 1681q further confirms that, contrary to the Ninth Circuit's holding, "willful noncompliance" in section 1681n(a) does not refer to an intermediate level of culpability between negligence and knowing, but creates a higher standard for liability that requires an intentional and deliberate failure to comply with the requirements of the FCRA.

In sum, examination of the language and context of section 1681n(a) and of the "complex of provisions in which [it is] embedded," *Ratzlaf*, 510 U.S. at 141, demonstrates that there can be liability for "willful" noncompliance with the requirements of the FCRA only if it is shown that the defendant knew that its conduct was unlawful and deliberately and intentionally violated the statute. As shown below, that conclusion is supported also by an analysis of the purposes and objectives of the FCRA.

B. The Purposes and Enforcement Needs of the FCRA Are Not Served by the Expanded Liability Created by the Ninth Circuit's Reckless Disregard Standard

In addressing the meaning of the word "willful," this Court has considered the purposes of both the particular statutory provision and the larger statutory scheme of which it is a part, the nature of the conduct regulated or prohibited by the statute, and the scope of enforcement and deterrence needed to effectuate the statutory goals. Despite lip service to the need for a "fair and balanced" approach that purportedly "best furthers the purposes and objectives of the Act," *Reynolds*, 435 F.3d at 1099, the Ninth Circuit's opinion is lopsided, elevating enforcement and deterrence over other statutory purposes.

In enacting and amending the FCRA, Congress sought to regulate an aspect of economic activity -- the use and distribution of credit information -- that it recognized was a vital and necessary part of a healthy, functioning economy. In seeking to ensure the accuracy of credit information, Congress acted not only to protect consumers, but to advance the needs of the nation's economic system.[8] The Ninth Circuit's expansive interpretation of the statutory term "willful" upsets the balance struck by Congress and places an excessive and potentially crushing burden of liability on users and providers of credit information, facilitating and encouraging huge nationwide class actions seeking statutory and punitive damages. Under the Ninth Circuit's erroneous "recklessness" standard, this massive litigation can be accomplished without the plaintiffs having to prove knowing and intentional wrongdoing on the part of the defendant, and without having to prove that they have suffered any actual harm at all from the instances of noncompliance they allege. This result is damaging to the nation's economic system and credit markets and is not compatible with the purposes of the FCRA.

Different interpretations of the word "willful" may be required to advance the purposes and enforcement of different statutes. For example, as noted above, section 523(a)(6) of the Bankruptcy Code, which excepts from discharge debts for "willful and malicious injury by the debtor to another . . . " applies only to "deliberate or intentional injury," not to recklessly caused injuries. *See Kawaauhau,* 523 U.S. at 61. A "more encompassing interpretation" would improperly except a wide range of debts from discharge (*id.* at 58) – a result long held to be contrary to the purposes of the bankruptcy statutes. Conversely, under 26 U.S.C. § 6651(a)(1), which establishes civil penalties for failure to file a tax return "unless it is

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[8] *See, e.g.*, Senate Report No. 108-166 (Oct. 17, 2003), *available at* 2003 WL 22399643, at *6-7 (achieving accuracy in consumer report information was a main goal of the FCRA because "inaccuracy retains the potential to be particularly unfair to any given consumer and to cause general inefficiencies in the operation of the credit markets;" the goals of 1996 FCRA amendments were to improve accuracy of credit information and "enhance the development of national credit markets").

shown that such failure is due to reasonable cause and not due to willful neglect," "willful neglect" is interpreted as including both "a conscious, intentional failure" and "reckless indifference." *United States v. Boyle*, 469 U.S. 241, 245 (1985). As this Court explained, the purposes and enforcement needs of the internal revenue system required that standard, given that "[t]he Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards." *Id.* at 249.

In the case of criminal penalties for "willfully violating" statutory provisions prohibiting structuring currency transactions to evade reporting requirements, this Court has interpreted the word "willfully" to mean with knowledge that the structuring was unlawful. *Ratzlaf*, 510 U.S. at 146-47. Significantly, in *Ratzlaf*, the Court was "unpersuaded by the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring." *Id.* at 146. Rather, the Court observed that in many instances an individual may permissibly structure a transaction so as to achieve a particular result under the applicable statutes. *Id.* at 145 ("Courts have noted 'many occasions' on which persons, without violating any law, may structure transactions 'in order to avoid the impact of some regulation or tax.'") (citations omitted). Accordingly, in that context, a willfulness standard requiring knowledge of illegality is necessary to protect individuals engaging in behavior they believe to be permissible. The Court also noted that if Congress had wished to impose liability "irrespective of the defendant's knowledge of the illegality of structuring," it "could have furnished the appropriate instruction." *Id.* at 147.

Likewise, the statutory purposes and the nature of the conduct prohibited appears to have been a significant factor in this Court's interpretation of the word "willful" in employment discrimination statutes. Those statutes were enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace" and "reflect[] a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995); *see also Kolstad v. Am. Dental Ass'n*,

527 U.S. 526, 550 (1999) (Stevens, J., concurring in part and dissenting in part, joined by JJ. Souter, Ginsburg, and Breyer) (rejecting statutory interpretation of punitive damages standard under Title VII and the ADA that would have limited punitive damages to "only those violations that are accompanied by particularly outlandish acts"). Where the conduct prohibited by a statute is condemned by society and threatens the fundamental rights of other persons, a defendant's reckless disregard of the statutory prohibition may qualify as "willful," and the resulting heightened level of deterrence and enforcement furthers the statutory objectives.

In contrast, the FCRA regulates economic and financial practices. While the FCRA seeks to protect individual consumers from potential injury caused by inaccuracies in their credit reports, it also recognizes the economic efficiencies and beneficial aspects of the "current system" of the use of credit information that "makes more credit available, to a greater range of consumers, on a more timely basis." S. Rep. No. 108-166, *available at* 2003 WL 22399643, at *4. This has been accomplished through advances in technology that have made credit information available on a very large scale, so that "a consumer's credit risk is carefully calculated so that he is offered a particular rate or terms that closely match the risks his report suggests he poses." *Id.* at *7; *see also id.* ("Because of the precision it affords creditors, risk-based pricing has made credit available to many more people."). Thus, Congress has recognized that "[o]verall, the use of risk-based pricing provides numerous benefits to the economy and consumers." *Id.* at *8. These benefits are presented in the use of credit information in insurance underwriting, as well. In short, the FCRA regulates beneficial economic activity in a "consumer reporting system" of "vast size and complexity" that "supports decision making with respect to trillions of dollars of consumer credit and insurance and millions of jobs." *Id.* at *6-7. Accordingly, the statutory purposes and enforcement needs of the FCRA are not comparable to those of the anti-discrimination statutes at issue in the cases upon which the Ninth Circuit relied. *See Reynolds*, 435 U.S. at 1098 (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128

(1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993)).[9]

That Congress did not intend users and providers of credit information to be subject to the expanded liability engendered by the Ninth Circuit's decision is also confirmed by the fact that since the original enactment of section 1681n in 1970 the Courts of Appeals have consistently held that "willfulness" requires knowledge that the conduct is unlawful or a *conscious* disregard of the law. *See, e.g., Stevenson v. TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993) (no willful noncompliance where defendant did not act "knowingly and intentionally" and "in conscious disregard of consumers' rights"); *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 969-70, 972 (4th Cir. 1987) (willfulness requires that FCRA has been "violated 'voluntarily and intentionally'") (citation omitted); *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986) (reversing award of punitive damages under FCRA for lack of willfulness where there was "no evidence that [defendants] knowingly and intentionally committed an act in conscious disregard for the rights of others").[10] Significantly, after

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[9] This Court's analysis in *Thurston* also relied extensively on the legislative history of the ADEA, which strongly suggested that Congress intended the ADEA to apply to reckless conduct. *See* 469 U.S. at 127-29; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (recognizing that the *Thurston* "reckless disregard" standard was grounded in the legislative history of the ADEA). There is no support in the legislative history of the FCRA for interpreting "willful" noncompliance under section 1681n(a) to include reckless disregard.

[10] *See also Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002) ("[W]illful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law"); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (an actual belief of legality suffices to defeat willfulness liability under the FCRA); *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995) (holding that defendant's "course of conduct d[id] not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA"); *Dalton v. Capital Associated Indus. Inc.*, 257 F.3d 409, 418 (4th Cir. 2001) ("willfulness" under the FCRA requires that the defendant "'knowingly and intentionally committed an act in conscious disregard for the rights'"

these decisions, when section 1681n was amended in 1996, Congress made no change to the standard for willful violations of the Act.[11] Presumably, had Congress intended willfulness to include reckless disregard, it could have amended the statute to add the word "recklessly."

In appropriate statutory contexts, "willfulness" may be interpreted to include recklessness – particularly where the conduct in question involves a serious risk of impairing fundamental rights or causing physical injury. Such an interpretation is inappropriate, however, in other contexts such as the FCRA. This distinction accords with common-sense observation as to how the word "willful" is used in ordinary language. It also is consistent with basic common law principles relevant to the issue of when reckless conduct is sufficient to merit punitive damages. Typically, punitive damages are deemed appropriate for reckless conduct only if the conduct causes physical injury or results in a deprivation of a fundamental constitutional right.[12] Conduct that causes or threatens only economic harm generally must be intentional to merit punitive damages. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (differentiating between economic and physical harm; listing "reckless disregard of the health or safety of others" as factor in punitive damages analysis); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 (1996) (noting absence of "reckless disregard for the health and safety of others;" stating that "infliction of economic injury, especially when done *intentionally* through affirmative acts of misconduct" can

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of the consumer) (citation omitted); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) ("To act willfully, a defendant must knowingly and intentionally violate the Act, and it 'must also be conscious that [its] act impinges on the rights of others.'") (alteration in original; citation omitted).

[11] In contrast, under Title VII, Congress spelled out its intent that punitive damages may be awarded for intentional discrimination if it is demonstrated that the employer acted with "malice or with reckless indifference to the [plaintiff's] federally protected rights." 42 U.S.C. § 1981a(b)(1).

[12] *See, e.g., Casillas-Diaz v. Palau*, 463 F.3d 77, 84-85 (1st Cir. 2006). (punitive damages appropriate where defendants acted "with reckless disregard of plaintiffs' constitutional rights").

warrant punitive damages) (emphasis added; citation omitted).

In concluding that a "reckless disregard" standard would be "fair and balanced" and would "best further the purposes and objectives of the Act," the Ninth Circuit improperly emphasized what it viewed as the need to ensure that section 1681n "d[id] not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression'" and to distinguish between such companies and companies who might "come to a tenable, albeit erroneous, interpretation of the statute." *Reynolds*, 435 F.3d at 1099; *see also id.* ("reliance on creative lawyering that provides indefensible answers will [not] ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement"). Based upon such considerations, the Ninth Circuit in *Reynolds* reversed the grant of summary judgment in favor of the defendants on the issue of willfulness, ruling that "at least some" of the defendant insurance companies' interpretations of the FCRA were "implausible" or "frivolous." *Id.* at 1095, 1099. The Ninth Circuit's precepts as to the application of its willfulness/recklessness standard and its concerns that companies and attorneys will abuse situations in which they are faced with a question of "first impression" have no basis in the statutory language of the FCRA and its purposes and objectives, or for that matter, in the legislative history.

Under the Ninth Circuit's decision, factors that normally favor a finding of an absence of willfulness and/or recklessness as a matter of law are turned on their heads, all in service of a jaundiced and unsupported view of how businesses and companies formulate their conduct in regulatory and compliance contexts and how lawyers view their obligations to their clients and to the legal system. For example, the fact that an issue is one of first impression normally weighs toward excusing or mitigating a failure to understand a legal issue or comply with regulatory requirement. Thus, in *Stevenson*, 987 F.2d at 296, the Fifth Circuit reversed a finding of willful noncompliance and an award of punitive damages under the FCRA because "[t]here

was no prior guidance to suggest" that the defendant's conduct did not comply with the Act.[13] Likewise, the fact that a defendant has consulted counsel or that (as in the present cases) the trial court agreed with the defendants' interpretation of their legal obligations would generally negate willfulness even under a recklessness standard. *See, e.g., Thurston*, 469 U.S. at 129 (defendant did not act in reckless disregard of ADEA's legal requirements where its "officials met with their lawyers to determine whether the mandatory retirement policy violated the Act"); *see also* Vairo, *supra* note 13, at 351 (the fact that judges who have ruled on the merits of a pleading disagree provides significant evidence that the pleading was not frivolous or unreasonable).[14] The Ninth Circuit incorrectly operates under the opposite presumption.

In sum, the Ninth Circuit's interpretation of section 1681n(a) as applicable to conduct that the defendant does not

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[13] Similarly, in the context of Federal Rule of Civil Procedure 11, courts have repeatedly refused to find a legal argument frivolous or unreasonable where it concerns a matter of first impression. *See* Georgene M. Vairo, *Rule 11 Sanctions: Care Law, Perspectives and Preventative Measures* 340-46 (3d ed. 2004).

[14] Notably, in an earlier version of the opinion in *Reynolds*, the majority found that the defendants' interpretations of the statutory definition of adverse action were unreasonable and implausible as a matter of law and held that the defendants' "reliance on such implausible interpretations constitutes reckless disregard for the law and therefore amounts to a willful violation of the law." *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 426 F.3d 1020, 1038 (9th Cir. 2005), *amended*, 435 F.3d 1081 (9th Cir. 2006). The majority declined to remand these cases to the district court for a finding on willfulness, noting that "[b]ecause the district judge has already ruled that the companies' positions on all of the principal issues were correct as a matter of law, she has also held, a fortiori, that the companies' reliance on these positions did not amount to reckless disregard for the law" and that it would be "futile[] to remand to the district court the questions whether the companies willfully failed to comply with FCRA." 426 F.3d at 1039 n.19. Judge Bybee dissented from this aspect of the majority's opinion, pointing out that the "district court *agreed* with [defendants'] legal position, a position the majority now declares to be 'nonsensical' and 'untenable.'" *Id.* at 1041 (Bybee, J., dissenting in part).

know to be unlawful is inconsistent with the language and purposes of the statute. Moreover, even if a recklessness standard were appropriate, the Ninth Circuit's directives on how a reckless standard would apply in the cases at bar warrant correction by this Court.

II. THIS COURT SHOULD CORRECT THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE FCRA'S DEFINITION OF "ADVERSE ACTION"

In its decisions below, the Ninth Circuit disregarded the ordinary and natural meanings of key terms in the statutory definition of "adverse action" in section 1681a(k)(1)(B)(i) of the FCRA, thereby expanding the notice obligations imposed upon insurance companies far beyond what the plain words of the statute authorize. In particular, the Ninth Circuit erred in ruling that the FCRA "requires [an adverse action] notice[] whenever a consumer pays a higher rate because his credit rating is less than the top potential score." *Reynolds*, 435 F.3d at 1093. The Ninth Circuit's holding erroneously expands the statute to cover factual circumstances in which (i) there is no credit information available for a consumer, (ii) the consumer obtains insurance rates that are better than those he would have had if his credit information had not been used, and (iii) the consumer is provided insurance at the rate previously quoted to him without use of his credit information. The Ninth Circuit's decision imposes a heavy burden on insurance companies making lawful use of credit information and is likely to result in a deluge of notices that will either confuse consumers or be ignored by them.

The "top potential" credit benchmark invented by the Ninth Circuit is found nowhere in the language of the statute. Use of that benchmark to determine whether there has been an increase in the rates charged for insurance within the meaning of the FCRA's definition of adverse action would lead to the untenable result, certainly unintended by Congress, that virtually every purchaser of insurance would be required to receive a FCRA notice. *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (statutes should not be read to produce absurd and untenable results). The "ordinary

or natural" reading of "an increase in any charge" implies a simple and logical benchmark, *i.e.*, the price that was actually quoted or would have been quoted to the consumer without reference to credit information.

Significantly, Congress knows how to draft statutory language describing an action based on an unfavorable rate, even though there has been no "increase in any charge." Thus, in 2003, Congress enacted 15 U.S.C. § 1681m(h), as part of the Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159, tit. III, § 311(a). Section 1681m(h)(1) requires notice when "any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit *on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person*, based in whole or in part on a consumer report." 15 U.S.C. § 1681m(h)(1) (emphasis added). Section 1681m(h)(1) also demonstrates that, contrary to the Ninth Circuit, Congress has not made a policy determination to require notice to everyone who receives less than the most favorable terms, but only to those who receive terms less favorable than the most favorable terms available to a substantial proportion of consumers.

At the same time Congress added to the FCRA the definition of adverse action at issue in these cases, it amended the FCRA to make plain that insurance companies and credit companies may permissibly make offers to consumers prescreened on the basis of their credit information, without triggering notice obligations to consumers who do not receive the offer. *See* S. Rep. No. 104-185, at ~32-33 (1995) (discussing 15 U.S.C. § 1681b(c)(1)(B)(i) & 1681a(l);"failure to include a consumer in a prescreening solicitation does not constitute adverse action"). The same amendments also made clear that a company may use consumer reports to review the accounts of existing customers, and that there is no adverse action if a consumer's account is not changed, even if the accounts of other consumers are changed in a favorable manner. *See id.* (discussing 15 U.S.C. 1681a(m)). These amendments, which accompanied Congress's enactment of the definition of "adverse action" in the insurance context, are not compatible

with an interpretation of the definition of adverse action that is aimed at achieving the widest possible obligation to send adverse action notices.

The Ninth Circuit's erroneous rulings, if allowed to stand, will create vastly expanded, costly and burdensome notice obligations under the FCRA. These rulings should be reversed.

CONCLUSION

For all the foregoing reasons, *amicus curiae* respectfully submits that this Court should reverse the Ninth Circuit's decisions, both as to the Ninth Circuit's interpretation of the statutory term "willfully" in section 1681n(a) of the FCRA and as to its interpretation and application of the statutory definition of adverse action in section 1681a(k)(1)(B)(i) of the FCRA.

Respectfully Submitted,

Christian Rataj
National Association of
Mutual Insurance Companies
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Sheila L. Birnbaum*
Barbara Wrubel
Douglas W. Dunham
Ellen P. Quackenbos
**Counsel of Record*
Skadden, Arps, Slate,
Meagher & Flom LLP
Four Times Square
New York, NY 10036
(212) 735-3000

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Nos. 06-84 and 06-100

In The Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, et al.,

Petitioners,

v.

CHARLES BURR, et al.,

Respondents.

GEICO GENERAL INSURANCE COMPANY, et al.,

Petitioners,

v.

AJENE EDO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE THE NATIONAL CONSUMER LAW CENTER, INC., THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE U.S. PUBLIC INTEREST RESEARCH GROUP, THE NATIONAL ASSOCIATION OF CONSUMER AGENCY ADMINISTRATORS, THE CENTER FOR RESPONSIBLE LENDING, AND THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENTS

RICHARD J. RUBIN
(*Counsel of Record*)
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418

JOANNE S. FAULKNER
123 Avon Street
New Haven, Connecticut 06511
(202) 772-0395

CHI CHI WU
NATIONAL CONSUMER LAW CENTER
77 Summer Street, 10th Floor
Boston, Massachusetts 02110
(617) 542-8010

ELIZABETH D. DE ARMOND
Chicago-Kent College of Law
ILLINOIS INSTITUTE OF TECHNOLOGY
565 W. Adams Street
Chicago, Illinois 60661
(312) 906-5172

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI CURIAE[1]

Amici are public interest organizations with long-standing experience with the consumer reporting and privacy issues implicated by this case. Amici submit this brief to provide the Court with background information about the consumer reporting industry. The brief focuses on the implications that the Court's decision inevitably will have on the broader credit, credit reporting, and privacy aspects of the Fair Credit Reporting Act (FCRA).

The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts corporation specializing in consumer law, with historical emphasis on consumer credit. NCLC is recognized nationally as an expert in consumer credit issues, including fair credit reporting, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 36 years. NCLC is the author of the Consumer Credit and Sales Legal Practice Series, consisting of 16 practice treatises and annual supplements. One volume, Fair Credit Reporting Act (5th ed. 2002 & Supp. 2005), is a standard resource on privacy and the FCRA. Petitioner GEICO relies on this treatise in its Brief. GEICO Brief, at 3 and 25. Among the authors of this treatise are undersigned counsel.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amici Curiae, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Compliance with federal consumer protection laws in general, and the FCRA in particular, has been a continuing concern of NACA since its inception.

The U.S. Public Interest Research Group serves as the federation of, and the national advocacy office for, state Public Interest Research Groups (PIRGs). PIRGs are non-profit, non-partisan consumer, environmental, and government research and advocacy organizations with one million members around the country. Since 1991, U.S. PIRG and the state PIRGs have published seven investigative reports and surveys on credit bureau errors and identity theft problems, including one joint report with the Privacy Rights Clearinghouse. Congress and state legislatures have used the reports in the development of legislation ranging from 25 state credit report security freeze laws to pro-consumer Congressional amendments enacted in 1996, 1998, and 2003, including the right to a free credit report on request and others responding to accuracy and identity theft problems.

The National Association of Consumer Agency Administrators (NACAA) is a non-profit organization that works with consumers to solve problems, prosecute offenders, advance legislation, and educate the public. NACAA's members are public and private advocates, including more than 160 government agencies and 50 corporate consumer offices in the United States and abroad.

The Center for Responsible Lending (CRL) is a non-profit organization which has directed research and policy work on issues related to preemption, predatory lending,

discrimination in credit markets, and other banking services. CRL's parent organization is the Center for Community Self-Help, whose mission is to create ownership and economic opportunities for minorities, women, rural residents, and low-wealth families. CRL has testified numerous times before Congress, has worked with consumers and consumer organizations on financial services issues both nationally and at the state level, and has appeared frequently as an amicus in cases involving financial services to minorities and low and moderate income families.

The Consumer Federation of America (CFA) is a non-profit association of over 300 non-profit organizations from throughout the nation with a combined membership exceeding 50 million people. CFA was founded in 1968 to advance consumer interest through advocacy and education. CFA has a long history of educating consumers about and advocating for stronger credit reporting consumer protections. For example, CFA has supported the use of adverse action notices for credit and insurance purposes as essential to informing consumers about the higher rates that they may have to pay as a result of their credit or insurance score. In December 2002, CFA and the National Credit Reporting Association issued a report on credit scoring entitled "Credit Score Accuracy and Implications for Consumers." The report documented that millions of Americans could pay more for, or be denied credit, insurance, or utilities because of inaccurate or incomplete credit scores and reports. CFA has conducted consumer knowledge and opinion surveys about credit scoring, documenting that many consumers do not understand basic facts about how credit scores are developed. CFA has also published a free educational brochure for consumers with Fair Isaac Corporation entitled "Your Credit Scores."

SUMMARY OF ARGUMENT

Congress's findings and statement of purpose when it enacted the FCRA, its ongoing oversight, and its recent amendments demonstrate the significance it rightly placed on the integrity and confidentiality of the nation's consumer reporting system. Unfortunately, over the last 35 years, the national consumer reporting agencies have demonstrated an inadequate commitment to conducting their business in a manner commensurate with the grave responsibilities entrusted to them. The resulting systemic deficiencies have heightened the importance of the adverse action notice and statutory civil damages at issue here since they are essential tools that Congress provided consumers to enable them to detect, correct, and seek redress for problems with their own credit reports.

Congress recognized that responsibility for protecting the accuracy and confidentiality of the 600 million individual reports on 200 million Americans maintained in the vast databases of the Big Three consumer reporting agencies is beyond the capabilities of public enforcement agencies.[2] Congress instead gave primary responsibility to the persons with the greatest interest in accomplishing such a task – individual consumers policing their own files and when necessary enforcing the FCRA's private statutory remedies.

Petitioners are seeking a restrictive application of the statutory willfulness standard that would undermine the indispensable private attorney general role that Congress chose as the FCRA's primary enforcement mechanism. Petitioners' position on the willfulness standard would

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[2] The Big Three national consumer reporting agencies, commonly referred to as credit bureaus, are Trans Union, Equifax, and Experian, f/k/a TRW.

undercut the recent concerted efforts of Congress, the Federal Trade Commission, consumer advocacy groups, law enforcement agencies, and ordinary citizens to increase compliance with the FCRA. Relaxing enforcement standards now is particularly untimely and unwarranted. Moreover, Petitioners' legal contention conflicts with other FCRA provisions and is contrary to precedent of the Court.

In recent years Congress targeted the deficiencies of the Big Three reporting agencies in maintaining the integrity of the consumer reporting system. After 25 years of relative inactivity, Congress overhauled the FCRA twice in the last ten years to strengthen its substantive accuracy standards, privacy protections, and private enforcement mechanism. During this process, Congress heard evidence of widespread noncompliance and abuses by all participants in the reporting industry: the Big Three consumer reporting agencies, those who furnish information to the reporting agencies (furnishers), and the end users of the credit reports (users). The efficacy of Congress's efforts to remedy these deficiencies is at stake in this case.

A relatively recent assault on the integrity of the consumer reporting system has emerged in the form of theft of identity, a phenomenon that poses a threat to every American with a credit report. The reporting industry, if it chooses, has the capacity to curtail identity theft, if not to bar virtually all identity thieves from compromising individual credit reports, the *sine qua non* of the offense. Instead, because the industry has chosen not to do so, the dysfunctional consumer reporting system itself has become the vehicle through which these thieves operate.

By attacking the insurance adverse action notice of § 1681a(k)(1)(B)(i), Petitioners propose that the Court eliminate an information-sharing device essential to the FCRA's self-help system. That system relies on consumers monitoring their own reports as the linchpin of its

effectiveness. Consumers who do not receive an adverse action notice consequently do not learn of their right to a free credit report to check its accuracy and to initiate the formal dispute process if any information is inaccurate. Even if the information is accurate, consumers who do not receive the notice are not alerted to the shortcomings in their own credit profile so they can take necessary corrective action to improve their standing. Providing an adverse action notice to consumers who qualify only for a higher insurance premium is particularly important for those identity theft victims who are not active credit users, as this notice may be the only alert they ever receive that their credit profile has been compromised. Petitioners want to deny consumers the adverse action notice that often is their first indication that they are victims of identity theft.

The harmful consequences of Petitioners' contentions are not limited to disrupting the internal workings of the FCRA. Rather, Petitioners' position would upset the interplay between the FCRA and other titles of the Consumer Credit Protection Act and, in turn, impede the efficiency of the open market. Petitioners want to conceal that they are not offering customers the best rate available. This deception prevents consumers from comparison shopping for a better rate and, of course, results in customers unwittingly paying more than they might otherwise pay. Petitioners' putative elimination of the statutorily mandated adverse action notice is an anti-competitive practice in our free market that otherwise relies on informed consumers and honest competition rather than captive customers held in ignorance.

ARGUMENT

A. Congress Enacted the FCRA to Ensure Accuracy and Protect Privacy in Disseminating Consumers' Personal Financial Information

1. Congress Determined That Accuracy and Respect for Privacy Are Essential to a Competitive Credit Economy in the Information Age

Congress enacted the FCRA in the explicit recognition that the health of the consumer banking system "depend[s] upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." § 1681(a)(1). Congress focused on the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right of privacy" and "confidentiality." § 1681(a)(4) and (b). The Court summarized these precepts in its only FCRA decision to date:

> Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy. As relevant here, the Act seeks to accomplish those goals by requiring credit reporting agencies to maintain reasonable procedures designed to assure maximum possible accuracy of the information contained in credit reports and to limit the furnishing of such reports to certain statutorily enumerated purposes.

TRW Inc. v. Andrews, 534 U.S. 19, 23 (2001) (internal quotations, ellipsis, and citations omitted).

In enacting the FCRA, Congress intended to regulate the disclosure of a vast amount of personal information bearing not only on consumers' "credit worthiness, credit standing, [and] credit capacity," but also on their "character, general reputation, personal characteristics, or mode of living." § 1681a(d) (defining "consumer report"). Information about one's finances is particularly sensitive:

"Financial transactions can reveal much about a person's activities, associations, and beliefs." *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Many genuine, justifiable purposes exist for using credit reports, and the FCRA explicitly authorizes those uses while prohibiting all others. § 1681b(a) and (f).

Congress's goals in enacting the FCRA are even more critical given the exponential growth in consumer credit over the past several decades. Consumer credit (non-real estate) now comprises one of the largest sectors of the national economy, growing from $6 billion at the end of World War II, to $116 billion in 1970 when Congress enacted the FCRA, S. Rep. 103-209, 103d Cong., 1st Sess., at 2-3 (1993), and most recently passed $2.378 trillion.[3]

The credit reporting industry has similarly expanded to support this phenomenal level of activity. Only 13 years ago the consumer reporting industry maintained credit files on about 110 million individuals and cumulatively processed almost 2 billion pieces of data per month. S. Rep. 103-209, at 3. Now, the databases of the Big Three have almost doubled, containing information on the personal financial habits of 200 million persons, the overwhelming majority of the entire adult population of the country. Brief of Amicus Curiae Trans Union, LLC, at 1. In this same period, the amount of data has tripled, with Trans Union alone processing over 2 billion pieces of data per month in its own database, *id.*, and Experian claiming to receive 50 million updates per day from approximately 40,000 furnishers. *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004).

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[3] Federal Reserve Board Statistical Release, G.19, Consumer Credit, October 2006, Release Date: December 7, 2006, available at <http://www.federalreserve.gov/Releases/G19/Current>.

2. Congress Enacted the Consumer Credit Protection Act to Encourage Informed Use of Credit

Congress enacted the FCRA in 1970 as Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (CCPA), the umbrella act containing the federal statutes regulating the consumer credit industry. Other titles in the CCPA include the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667e; the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f; and the Fair Debt Collection Practices Act, (FDCPA), 15 U.S.C. §§ 1692-1692o. A recurring theme at the heart of the CCPA is that prudent dissemination of credit information is essential to maintain the vitality of the credit granting system in a competitive and open market for the benefit of creditors and consumers alike. Just as Congress enacted the FCRA with the express purpose to enable credit grantors to be in the best position to make reliable lending decisions, TILA establishes the corresponding principle through its disclosure requirements that consumers are best served through their own "informed use of credit." § 1601(a).

"Congress enacted the Truth in Lending Act in part because it believed 'consumers would individually benefit not only from the more informed use of credit, but also from heightened competition which would result from more knowledgeable credit shopping.'" *Till v. SCS Credit Corp.*, 541 U.S. 465, 482 (2004) (quoting S. Rep. No. 368, 96th Cong., 2d Sess. 16, *reprinted in* 1980 U.S.C.C.A.N. 252) (footnote omitted). In addition to the FCRA and TILA, Congress included a further self-help checking mechanism within the CCPA in the ECOA, providing yet another information-sharing standard through its core requirement that creditors disclose, and consumers receive, the specific reasons for any adverse action, such as credit denial. § 1691(d).

The Court stated the guiding principle of this Congressional philosophy over 30 years ago: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Serv., Inc.*, 411 U.S. 356, 364 (1973). The FCRA was passed with the recognition that credit decisions made on the basis of faulty information, whether by credit grantors or consumers, undermine the vitality of the consumer economy. The successful operation of the consumer credit system is fundamental to the national economy and the ability of Americans to enjoy the fruits of this country's material prosperity. The strength of this system is a function of the soundness of the individual decisions that comprise it. Failure within this system is not only expensive but also severely disruptive, causing "bankruptcies, marital instability, loss of jobs, and invasions of individual privacy." § 1692(a) (FDCPA). Simply put, the viability of our credit economy depends on accurate information; Congress designed the FCRA to increase that accuracy.

B. Private Enforcement is Essential to Ensuring That the Reporting Industry Complies With the FCRA

1. Petitioners Want to Weaken Private Enforcement Remedies at the Very Moment When Congress Has Strengthened Them

Congress clearly recognized the crucial role that consumers play in enforcing the CCPA when it adopted six titles with private attorney general enforcement provisions.[4] No one has a stake in the accuracy or privacy of a

[4] *See* 15 U.S.C. §§ 1635, 1640, and 1667d (TILA); § 1679g (Credit Repair Organizations Act); § 1681n and 1681o (FCRA); § 1691e (ECOA); § 1692k (FDCPA); and § 1693m (Electronic Funds Transfer Act).

credit report like the consumer to whom it relates. While the FTC deals as best it can with systemic issues (§ 1681s), Congress has not funded the army of regulators that would be necessary to monitor the 600 million files that the Big Three maintain. Congress gave that role to each of the individuals whose tranquility and material well-being are determined by these faceless, computer-generated reports. *See Bryant v. TRW Inc.*, 689 F.2d 72, 79 (6th Cir. 1982) (quoting 116 Cong. Rec. 36570 (1970)) ("[A]s Shakespeare said, the loss of one's good name is beyond price and makes one poor indeed").

Congress and the FTC both have reaffirmed the FTC's own limitations and this critical role played by consumers. During the legislative hearings that culminated in the 1996 amendments to the FCRA, the FTC acknowledged that the FCRA "was designed to be largely self-enforcing" and expressed its position directly to Congress that any amendments maintain "the capacity of consumers to bring private actions to enforce their rights under the statute." S. Rep. 103-209, at 6. Congress's response was to strengthen private enforcement by encouraging consumer litigation through the adoption of a specific civil prohibition against unlawful access or use of credit reports (§ 1681b(f)) and the minimum statutory damages now being challenged (§ 1681n(a)(1)). Congress also created for the first time a private right of action allowing a consumer to sue furnishers of information for failing to meet their duties in the reinvestigation process. § 1681s-2(b); *see Nelson v. Chase Manhattan Mtg. Corp.*, 282 F.3d 1057 (9th Cir. 2002).

Congress enacted § 1681n(a) providing statutory and punitive damages for willful noncompliance as the sole consumer tool that might provide an incentive to defendants to comply with the FCRA. Whether one agrees or disagrees with the wisdom of this decision, Congress

exercised its prerogative and chose the award of money damages as its preferred private compliance instrument.[5] Petitioners disagree with that legislative decision, so they are asking for unprecedented and unwarranted relief from the Court.

Amici can add nothing to the persuasive substantive arguments presented in the Brief of the United States as Amicus Curiae applying the Court's prior teaching, showing the context in which Congress adopted § 1681n(a), and expounding the compelling public policy reasons that willful noncompliance includes the "reckless disregard" standard. Amici observe, however, that Petitioners appear unable to explain how Congress could have intended willfulness under § 1681n(a) to generally require a knowledge element when it specifically made knowledge a condition of § 1681n(a)(1)(B).

Petitioners' putative restrictive interpretations would significantly impair the essential consumer self-help role on which Congress constructed the FCRA. Both Petitioners and some of their Amici raise the specter that to affirm the opinion below would disturb the "balance" that Congress imposed within the structure of the FCRA. Safeco Brief, at 35 and 38; Brief of Amicus Curiae Trans Union, LLC, at 5, 6, 7, 8, and 10. In actuality, the statutory

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[5] The power to issue injunctive relief that "federal courts retain" "absent the clearest command to the contrary from Congress," *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), admittedly at times might be preferable to a suit for statutory or punitive damages. Nonetheless, the one circuit court to directly address the issue concluded that the FCRA does not permit consumers to seek injunctive relief. *Washington v. CSC Credit Servs, Inc.*, 199 F.3d 263, 268-69 (5th Cir. 2000). The reporting industry's current attempt to enfeeble the § 1681n(a) standard (*see* Brief of Amicus Curiae Trans Union, LLC, at 24), after having already convinced a lower court to eliminate private injunctive relief, suggests that the reporting industry's primary objection is to Congress's choice to provide private enforcement of the FCRA.

balance at risk is the central role that Congress intended consumers to play in ensuring accuracy of credit reports. Congress gave consumers the combined tools of the adverse action notice, free credit report, and dispute mechanism, and made these tools effective by providing the private attorney general enforcement remedy. Petitioners seek to compromise this legislative design.

2. The FCRA's Private Enforcement Mechanism Is Especially Critical Given the Unique Nature and Business Model of the Reporting Industry

Ensuring vigorous private enforcement of the FCRA is especially important because the credit reporting industry is unlike most other industries in some fundamental respects. First, the clients of the consumer reporting industry are the creditors who furnish or use the information contained in the reporting agencies' databases. Most of these creditors are reporting agency subscribers, which buy the ability to both send and receive consumers' credit histories. The reporting agencies' paying customers are these creditors, not the consumers whose life experiences comprise the 600 million credit reports in the agencies' databases.

Second, consumers have no say in whether their information is included in the reporting agencies' databases. Most Americans cannot avoid having a credit history. Even consumers who do not use credit are included if, for example, they have a cell phone or an unpaid medical bill. Still, credit is a necessity for all but the very wealthy. Most people, for example, must obtain a mortgage if they want to buy a house or receive student loans if they want to attend college. Thus, unlike almost all other business relationships, consumers who are unhappy with the actions of a reporting agency cannot vote with their

feet – they cannot remove the information or take their business elsewhere.

In this way, the reporting industry is almost quasi-governmental in nature, keeping files on almost every adult American whether they like it or not. The lack of choice whether to participate in the reporting system is also similar to a consumer's relationship with a public utility, yet the consumer reporting industry is not nearly as well regulated as a public utility. Apart from the very limited resources of the FTC, the major enforcement structure to "regulate" the consumer reporting industry is the private consumer.

Thus, while creditors can choose to switch between agencies if they wish, consumers are captives of the reporting agencies. Traditional competitive market forces therefore provide little incentive for reporting agencies to incur the costs to institute new procedures that ensure information is accurate or to undertake investigations to correct errors, since these activities primarily benefit consumers. Only the FCRA itself compels such behavior. Petitioners' invitation to dilute the FCRA's statutory penalties would weaken the only realistic protection that prevents the reporting agencies from ignoring the consumers whose lives can be ruined by incorrect information.

In contrast, by construing the remedy provisions, as Congress intended, to meaningfully penalize those who choose to violate the FCRA, the FCRA provides "optimal deterrence." Michael L. Rustad, *Punitive Damages in Cyberspace: Where in the World is the Consumer?*, 7 Chap. L. R. 39, 93 (2004). "Ordinary damages are an insufficient deterrent where the gain to the defendant exceeds any compensable injury." *Id.*

3. The FCRA's Private Remedies Are Often a Consumer's Only Recourse When Information Is Misused or Erroneously Reported

In many circumstances, the § 1681n(a) damages that Petitioners are trying to restrict are the only effective remedy against a reporting agency, furnisher, or user. Consumers may not be able to redress these privacy injuries by suing in tort because Congress granted agencies, users, and furnishers qualified immunity from most such state-law causes of action. Section 1681h(e), for instance, eliminates defamation, invasion of privacy, and negligence actions except as "to false information furnished with malice or willful intent to injure such consumer." *See also* § 1681t (preempting a comprehensive list of state laws).

Criminal liability is virtually nonexistent, except under § 1681q (knowingly and willfully obtaining information from a consumer reporting agency under false pretenses) and § 1681r (applying only to the reporting agencies' employees). The general criminal provision (§ 1681q) originally was interpreted by the courts to allow civil recovery under 1681n. *See e.g. Zamora v. Valley Federal S&L Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987). In 1996, Congress endorsed that approach when it copied the § 1681q "knowingly and willfully" language wholesale into § 1681n(a)(1)(B).

4. Petitioners Deliberately Took a Calculated Risk When They Ignored the Contrary FTC Staff Opinion

Amici have no special interest in the resolution of Petitioners' culpability in this matter once the Court establishes the standard for willfulness. It is striking, however, that Petitioners seek to present this case as nothing more than an innocent, harmless, and good faith

disagreement over an arcane and irresolvable (at the time) question of law for which their mistaken choice of one reasonable interpretation over another should not result in penalty damages. GEICO Brief, at 1-2. The available evidence, in fact, suggests another reasonable conclusion: that Petitioners knew their "interpretation" of § 1681a(k)(1)(B)(i) was not credible but decided to ignore the March 1, 2000, FTC staff opinion and their own internal candid assessment to the contrary, using the guise of plausible legal deniability in order to overcharge their customers and conceal the truth from them.

Under the CCPA, courts reject attempts like those of Petitioners to use self-induced errors of law to justify engaging in sharp business practices, absent determination by the trier of fact on the issues of good faith, knowledge, motive, and intent. *See Johnson v. Riddle*, 443 F.3d 723, 727-32 (10th Cir. 2006) (reversing grant of summary judgment under the FDCPA on debt collector's good faith, mistaken error of law defense to collecting excess charges). Furthermore, Petitioners' decision to ignore an FTC staff opinion squarely on point is a troubling and irresponsible practice that cannot be countenanced and that must be undertaken only at the actor's peril. Petitioners were on notice of the proper meaning of § 1681a(k)(1)(B)(i) and made a conscious decision to disregard it. Indeed, GEICO initially fully complied with § 1681a(k)(1)(B)(i) but actually abandoned that policy in favor of non-compliance. (Brief of the United States as Amicus Curiae, at 4). As the Court said long ago in the general context of consumer protection, "it does not seem 'unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.'" *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965) (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952)).

5. The Industry Can Show No Harm From Enforcement of FCRA Penalty Damages

Petitioners and their Amici cannot point to a single example where a final award of § 1681n(a) statutory or punitive damages has been even arguably excessive. Their stated fears and alarmist claims of mammoth awards instead are speculative at best, have no foundation in fact, and present no basis for the Court to take the preventive action to undercut § 1681n(a) that these unfounded claims are calculated to promote. If Petitioners' position is sustained, the participants in the consumer reporting industry will be given a green light to conduct business with little concern about meaningful private enforcement of statutory duties and no concern for the kind of enforcement that would deter violations or encourage compliance.

Given the nature of the injury to privacy, the importance of accurate credit reports, and the near exclusivity of the FCRA's remedies, any weakening of § 1681n(a) remedies would dissuade reporting agencies, furnishers, and users from valuing consumer privacy and instead would encourage strategic behavior to flout the FCRA's protections, as Petitioners may have done here. Minimizing the consequences for violating the FCRA would upset the balance between commerce and privacy that Congress sought to strike and would dissolve the legal barriers consumers have against prying eyes that want to view and exploit their individual information without any entitlement to do so. Consumers would be left with mere paper rights.

C. Vigorous Private Enforcement is Essential Because the Big Three Have Failed to Take Steps to Abate Inaccurate Reporting

1. The Credit Reporting System is Rife with Errors

Unfortunately, despite the intent of Congress in enacting the FCRA, the consumer reporting system does

not provide accurate information to its users. In the deliberations that culminated in the 1996 FCRA amendments,[6] Congress was presented with staggering statistics that nearly half of all credit reports (48%) maintained by the Big Three contained inaccurate information and nearly one out of five (19%) contained errors that could adversely affect the consumer's eligibility for credit. S. Rep. 103-209, at 3. More recent information shows a remarkable lack of improvement. Nat'l Ass'n of State PIRGs, *Mistakes Do Happen: A Look at Errors in Consumer Credit Reports* 11 (2004) (revealing that 25% of credit reports studied contained "serious errors").[7]

Despite the extraordinary economic and personal benefits at stake, the Big Three conduct their business with far too little regard for the inordinate personal price of their failure or for the mandates imposed by Congress to cure the agencies' shortcomings. *See, e.g., Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610-11 (7th Cir. 2005) (noting the court's sympathy with the consumer's "frustration" and identifying Experian's "systemic problem" in resolving consumer disputes); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 224-26 (3d Cir. 1997) (criticizing inadequate reinvestigation procedures); *Federal Trade Comm'n v. TRW Inc.*, 784 F.Supp. 361 (N.D. Tex. 1991) (entering a comprehensive consent order attempting to correct systemic FCRA noncompliance). The combined tools of adverse action notice, free

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[6] Consumer Credit Reporting Reform Act of 1996, Title II, Subtitle D, Ch. 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (Pub. L. No. 104-208) (Sept. 30, 1996).

[7] Available at <http://uspirg.org/home/reports/report-archives/financial-privacy – security/financial-privacy – security/mistakes-do-happen-a-look-at-errors-in-consumer-credit-reports>.

credit report, and dispute procedures are designed to correct these deficiencies.

2. The Reporting Industry Has Done Nothing to Fix Preventable Errors

The principal sources of the massive erroneous reporting are notorious and readily categorized: errors occur overwhelmingly as a result of 1) inaccurate information provided to the reporting agencies by furnishers, 2) the reporting agencies' over-inclusive matching algorithms that merge the profiles of two consumers with similar personal identifiers, and 3) an appalling indifference by the consumer reporting agencies to these known, preventable, and eminently correctable problems.

Significant impediments to correcting embedded erroneous information exist in the consumer reporting system. One defect of the consumer reporting system is the failure of the Big Three to exercise virtually any quality control over the information initially provided to them by furnishers. Until and unless a consumer lodges a formal dispute challenging the accuracy of information already published, the Big Three blindly rely on furnishers and provide no oversight of the quality of the information being reported. *See Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994).

This unquestioning acceptance and re-publication of furnisher information invites abuse. A well known truism is that reporting a debt to a reporting agency is a "powerful tool designed, in part, to wrench compliance with payment terms from" the alleged obligor. *Rivera v. Bank One,* 145 F.R.D. 614, 623 (D.P.R. 1993). In light of the available financial rewards, it is not surprising that some creditors are content to "slam" an innocent consumer's credit report, that is, furnish wrong information to reporting agencies to pressure a non-obligor to make payment

for the debtor who is actually responsible. *E.g., Johnson v. MBNA America Bank, NA,* 357 F.3d 426, 428-29 (4th Cir. 2004).

Another recurring furnisher abuse that results in inaccurate reporting is the "re-aging" of obsolete debts. This problem has grown particularly prevalent and profitable in recent years with the emergence of a multi-billion dollar distressed debt industry that buys, sells, and re-buys large portfolios of defaulted and time-barred debt for pennies on the dollar and then duns vulnerable consumers for inflated sums. The FCRA requires most consumer debts to be deleted from a credit report after seven years from the date of charge-off. § 1681c(a)(4). "Re-aging" occurs when these "scavenger" debt buyers purposefully misrepresent the date of charge-off to fall within the seven-year period, thereby resurrecting long dormant and nearly worthless debts with the simple act of false credit reporting. The FTC has tried to rein in this practice,[8] but the "re-aging" abuse continues at astounding levels.

Additional erroneous credit reporting results from the practice of merging the reports of two (or more) consumers with similar identifying information. This problem has plagued the reporting agencies since the FCRA was enacted, if not earlier. *See Thompson v. San Antonio Retail Merchants Assoc.*, 682 F.2d 509, 510-13 (5th Cir. 1982) (per curiam) (reporting agency negligently mixed the files of plaintiff William Douglas Thompson, III, with William Daniel Thompson, Jr.) In the 25 years since the problem

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[8] The FTC has brought enforcement actions over re-aging against two debt collectors, including one of the nation's largest debt collection firms. *United States v. NCO Group, Inc.*, Civ. No. 922-3012, *see* <www.ftc.gov/opa/2004/05/ncogroup.htm>, and *United States v. Performance Capital Management* (Bankr. C.D. Cal 2000), *see* <www.ftc.gov/opa/2000/08/performance.htm>.

was publicly identified as a systemic flaw, the Big Three have refused to correct their computer programs that decide how to link an individual consumer with the information maintained in their databases to create an actual credit report. *Federal Trade Comm'n v. TRW Inc.*, 784 F.Supp. at 362-63.

All three reporting agencies' systems are programmed to sort the information received from their 40,000 furnishers into a single credit report belonging to one individual whenever two of four designated identifiers associated with the data match: name, address, social security number, or date of birth. The systemic problem is that the Big Three use a "partial matching logic" that does not require an actual match of these identifiers but only a match of similar information. For example, this "partial matching logic" associates an individual with data when only seven of nine digits in a social security number match. This decision to identify a person based on only seven of nine numbers is particularly counterproductive since the social security number is the only truly unique identifier among the four. Merely requiring a full social security number match could end the mixed file phenomenon, still the Big Three refuse to implement even an eight of nine matching protocol.

In addition, the "partial matching logic" matches addresses with no more than the same state of residence and considers names to match by discounting variations such as spelling, middle names or initials, common nicknames, generational designations (Jr., Sr., III, etc.), and even completely different last names (to accommodate name changes after marriage). *See Apodaca v. Discover Fin. Servs.*, 417 F.Supp.2d 1220, 1224 (D.N.M. 2006). This "partial matching logic" literally invites the computer to combine the credit reports of two individuals into one. *See McKeown v. Sears Roebuck & Co.*, 335

F.Supp.2d 917, 924-27 (W.D. Wis. 2004) (documenting plaintiff James McKeown's ordeal to correct reporting agencies' file merger with deceased consumer James N. McOwen). Simply tightening the matching algorithms would eliminate an entire class of faulty reporting and enhance the accuracy that is so important to our credit system.

Readily identifiable inconsistencies on the face of individual credit reports instantly expose errors, yet recent cases have revealed that the reporting agencies have suppressed the fact that there are "easily available . . . procedure[s] that would greatly improve accuracy at a minimal cost." *O'Brien v. Equifax Info. Servs., LLC*, 382 F.Supp.2d 733, 739 (E.D. Pa. 2005).[9] Because the Big Three avoid implementing these and other reforms, the role of consumers acting to protect themselves is more crucial than ever. The adverse action notice is precisely tailored to this end.

3. The Consumer Reporting System Itself Has Exacerbated the Current Identity Theft Crisis

In 2003, Congress amended the FCRA by enacting the Fair and Accurate Credit Transactions Act (FACTA), Pub. L. No. 108-159 (2003). Title I of FACTA, entitled Identity Theft Prevention and Credit History Restoration, addresses the identity theft crisis that in Congress's judgment had "reached almost epidemic proportions in recent years." H.R. Rep. No. 108-263, at 25 (Sept. 4, 2003). The most important new FACTA duties imposed on

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[9] The *O'Brien* litigation revealed that the reporting industry had available the precise capability that Experian had refused to use in *Sarver v. Experian Information Solutions*, 390 F.3d 969 (7th Cir. 2004).

the reporting agencies are not proactive and instead are triggered only when consumers notify an agency of suspected fraud. *See, e.g.*, 1681c-1 and c-2. As a result, the Big Three unfortunately continue to ignore facially conflicting information that could identify a compromised credit report, particularly the anomalous billing address that must be established to commit and conceal the fraud.

Theft of identity occurs when an impostor poses as someone else and applies for and receives credit on the basis of another's good credit standing. The impostor then makes purchases, obtains credit cards, and takes out loans using the dishonestly obtained credit approvals that are all too easily obtained and leaves the victim facially responsible for the resulting financial obligations. Worse yet, the scam saddles victims with the arduous process of ascertaining what happened to them and of obtaining information to prove their innocence and to restore their good names. Aside from the dollar costs to businesses and individuals, one scholar estimates that consumers have lost nearly 600 million hours resolving identity theft problems over the last two years, contributing to the crime's "drag on the economy." Gary M. Victor, *Identity Theft, Its Environment and Proposals for Change*, 18 Loyola Consumer L. R. 273, 279 & n.34 (2006).

The ease with which impostors steal the identity of innocent victims is common knowledge and illustrates the allure of the scam. Typically, to obtain credit, impostors need only use the victim's social security number, while using a similar but different name and completely different remaining identifying information. Impostors use an alternate address (sometimes simply a mail drop) to receive the purchased items, credit cards, and billing statements. Victims therefore receive no notice that a

problem exists until they receive an FCRA and/or ECOA adverse action notice or are dunned for payment for the impostor's debts many months or even years later.

Concealing the fraud is essential to the thief. On average victims discover identity theft after 15 months, and at least 20% only learn of the problem after two years.[10] Even then, the victim still must determine what has transpired, often waiting weeks and months just to receive documents providing information about the accounts. This protracted process further prevents victims from taking remedial action and continues the nightmare as victims deals with demanding debt collectors and disbelieving creditors.

Information received by the reporting agencies almost always shows early evidence of obvious errors and indicia of fraud that the Big Three nevertheless ignore. The victims' records contain conflicting information, with one set revealing their real accounts, accurate addresses, and continued positive credit usage, and the other showing overused accounts with a lack of payments opened in a short time span, as well as the ever-present anomalous billing addresses. Still, Amici have seen no evidence that the Big Three have taken any action to use their comprehensive databases and state of the art computing power to effectively combat this scourge. Indeed, the Big Three have turned identity theft into a profit center to sell their credit-monitoring

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[10] *See* Federal Trade Commission, *Identity Theft Victim Complaint Data, Figures and Trends November 1999 through March 2001*, available at <http://www.consumer.gov/idtheft/reports/rep-mar01.pdf> and <http://www.consumer.gov/idtheft/charts/nov99-mar01.pdf>.

services that instead should be implemented as part of their core responsibilities to protect consumers' privacy.[11]

Significantly, although the Big Three disclose to users a consumer's file contents based merely on a purported match of a social security number, they do not disclose the file to consumers without additional indicia of proper identification. *See* § 1681h(a)(1). Given their parallel obligation pursuant to § 1681e(a) to provide reports only to users who have a legitimate purpose involving the subject consumer, one would have expected that these agencies would follow protocols with a similar level of scrutiny. *See* § 1681b(a). They do not. This "weakest link" creditor point of entry into the reporting system is all too well known to identity thieves, making the reporting system itself a target of opportunity.

D. Providing the Adverse Action Notice Here Will Ensure That Petitioners Do Not Keep Their Customers in the Dark When Congress Intended to Shed Light

The linchpin of the consumer oversight on which Congress built FCRA compliance is the adverse action notice. The notice is a direct link to the formal dispute process through which consumers may correct erroneous

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[11] As stated in the New York Times current series on identity theft, "It is not just criminals who are profiting from identity theft; financial institutions are making money, too. Fear of identity theft has helped give rise to a nearly billion-dollar business in credit-monitoring services sold by the major credit bureaus – companies like Equifax, Experian and TransUnion – as well as direct marketers and banks." Eric Dash, *Protectors, Too, Gather Profits From ID Theft*, December 12, 2006, available at <http://www.nytimes.com/2006/12/12/business/12credit.html?ref=nationalspecial2>.

information. § 1681i(a). The notice not only apprises consumers of the adverse action taken and thus the possibility of negative information on their report, but also must disclose the right to receive a free credit report from the responsible reporting agency under § 1681j(b) and summarize the process to initiate the formal dispute mechanism with the agency. § 1681m(a)(1)-(3). The FACTA amendments of 2003 placed an even greater emphasis on consumers' receipt of the adverse action notice that Petitioners now claim the FCRA does not mandate.

The adverse action notice is particularly important because, as discussed above, the consumer reporting system is plagued by errors. Failure to give the adverse action notice that Congress mandated to alert consumers to potential problems means that fewer errors are corrected and more unreliable information is disseminated to users.

Only when a consumer first finds inaccurate or incomplete information and then lodges a formal dispute with the reporting agency can errors realistically be corrected. § 1681i(a). The required notice of dispute to the furnisher from the reporting agency then triggers the furnisher's duty to conduct its own reasonable investigation of the challenged information and report the results back to the reporting agency under § 1681s-2(b). *See Johnson v. MBNA America Bank*, 357 F.3d at 429-32. Then the reporting agency must complete its own independent investigation of the dispute and finalize the remaining steps to meet its duties under § 1681i(a)-(d). Without an adverse action notice, this error correction procedure can never start.

Congress defined adverse action broadly in § 1681a(k) to advance the important public policies animating this essential consumer notification. Unlike Congress, Petitioners are unconcerned about the overall negative effect on the economy caused by inaccurate or incomplete information. Petitioners simply want to keep their customers in the dark. Petitioners apparently are not troubled that some of their customers will be denied the opportunity to know what is in their credit reports, to correct inaccurate or incomplete information, or to better appreciate their own credit habits and improve their credit status for the future.

Petitioners also show no concern that their failure to send an insurance adverse action notice will prevent some of their customers from discovering that they are victims of identity theft and from taking the immediate remedial measures that Congress deemed crucial to curbing the impact of this criminal epidemic. This notice is particularly important here since the complementary ECOA adverse action notice that is also sent when adverse action is taken in consumer credit transactions is not sent to insurance customers.[12] A significant number of Americans do not actively apply for credit on a regular basis. A great number of these individuals, however, periodically purchase insurance products, and for them the failure to

[12] As discussed in Section A.2, in addition to the FCRA, consumers have a separate right to an adverse action notice under the ECOA. § 1691(d). However, the right to a notice under the ECOA is limited to adverse action in "credit" transactions. § 1691(d)(6) (limiting ECOA adverse action to "credit" transactions). Thus, this separate right to an ECOA adverse action notice does not apply to insurance adverse action or other non-credit situations, leaving the FCRA the only basis for requiring an adverse action notice in these contexts.

receive an insurance adverse action notice would completely eliminate this theft of identity early warning system.

In addition, Petitioners are content that their customers will not learn that despite, for example, a pristine driving record, they are not receiving the best automobile insurance rate available because of a blemish on their credit report. To the contrary, Petitioners seem intent on depriving consumers of such empowering information essential to a free and efficient market. The possibility that these customers might, as Congress intended, correct or improve their credit standing is seemingly unimportant to Petitioners; and the certainty that some customers, if armed with accurate information, would take their insurance business elsewhere and pay less may well be the anti-competitive force driving Petitioners' decision not to provide adverse action notices.

E. The Framework in Which This Case Arises Does Not Represent a Typical FCRA Case

Amici wish to emphasize that the parties' debate here over willfulness in the context of the proper interpretation of the statutory adverse action definition is not representative of the usual FCRA case. Typical individual FCRA cases do not, as here, allege a disclosure violation of § 1681m(a) but focus instead on accuracy issues. Specifically, most FCRA cases that raise § 1681n(a) liability ask whether a reporting agency has breached its duty to report accurate information pursuant to § 1681e(b) or whether a reporting agency or furnisher has conducted a reasonable investigation of the accuracy or completeness of information that a consumer has specifically disputed, in violation

of § 1681i (for reporting agencies) and § 1681s-2(b) (for furnishers).

Thus, answering the question here whether "there was an objectively high risk that GEICO's construction of the law was wrong," as framed by the United States as Amicus Curiae (Brief, at 30), would not normally be appropriate in cases alleging a violation of §§ 1681e(b), 1681i, or 1681s-2(b). Instead, these cases typically ask first whether the defendant had notice or was aware of the claimed error or problem and whether it breached the duty of reasonable care to correct it; if so, a plaintiff will have established liability for negligent noncompliance under § 1681o. *See, e.g., Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333-34 (9th Cir. 1995); *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001). Then, in order to pursue the § 1681n(a) remedies, the plaintiff must show that the defendant's breach was not merely unreasonable but was done with the requisite disregard of its duty in order to establish willfulness. *See, e.g., Soghomonian v. United States*, 278 F.Supp.2d 1151, 1160-62 (E.D. Cal. 2003); *Apodaca*, 417 F.Supp.2d at 1228-34. Whether that standard includes reckless disregard or is limited to conscious disregard is, of course, the issue before the Court; but the instant formulation of whether a defendant knew, should have known, or disregarded the risk that it was misconstruing the law would not be readily transferable to these other types of individual accuracy cases.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

RICHARD J. RUBIN
(*Counsel of Record*)
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418

JOANNE S. FAULKNER
123 Avon Street
New Haven, Connecticut 06511
(202) 772-0395

CHI CHI WU
National Consumer Law Center
77 Summer Street, 10th Floor
Boston, Massachusetts 02110
(617) 542-8010

ELIZABETH D. DE ARMOND
Chicago-Kent College of Law
Illinois Institute of Technology
565 W. Adams Street
Chicago, Illinois 60661
(312) 906-5172

Counsel for Amici Curiae

077D

No. 06-84 and 06-100

In the Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, et al.,

Petitioners,

v.

CHARLES BURR, et al.,

Respondents.

GEICO GENERAL INSURANCE COMPANY, et al.,

Petitioners,

v.

AJENE EDO, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the States of Oregon, Arizona, Arkansas, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Minnesota, Missouri, Montana, New York, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin and Wyoming
Amici Curiae in Support of Respondents

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
*MARY H. WILLIAMS
Solicitor General
KAYE E. MCDONALD
Assistant Attorney General
1162 Court Street
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for State of Oregon

*Counsel of Record

WILSON-EPES PRINTING CO., INC. — (202) 789-0096 — WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, requires users of credit reports, including insurance companies, to provide notice to consumers against whom they take any "adverse action" based in whole or in part on any information contained in a credit report, and to inform the consumer of the right to obtain a copy of the report and to challenge its contents. 15 U.S.C. § 1681m(a). When a user of credit reports violates the notice requirements "willfully," as opposed to negligently, it may be liable for punitive damages. 15 U.S.C. § 1681n(a). The questions presented are:

1. Whether an insurance company takes an "adverse action" under § 1681m(a) by charging an insurance customer a higher insurance rate based at least in part on his or her credit report, when the customer would have been charged a lower rate if his credit information had been more favorable.

2. Whether, in order to have "willfully" violated the Fair Credit Reporting Act's requirements, a company must have actual knowledge that it is violating the Act's requirements, or if it is sufficient that the company act in reckless disregard of a consumer's rights under the Act.

3. If reckless disregard is sufficient to establish willfulness, whether a company may avoid further scrutiny into whether it willfully violated the Act by relying on a merely "colorable" interpretation of what constitutes an "adverse action" triggering the Act's notice requirement, as opposed to establishing that its erroneous interpretation was objectively reasonable.

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INTEREST OF THE STATE *AMICI*

The undersigned Attorneys General submit this brief on behalf of their respective States and pursuant to Rule 37.4. Congress enacted the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, to protect consumers from flaws in the credit reporting system and to improve the integrity and reliability of credit reports for business purposes. To those ends, the Act gives consumers the right, among other things, to receive notice from companies that consider a consumer's credit report as one basis for taking an adverse action against him or her, 15 U.S.C. § 1681m(a), and federal agencies may seek damages for negligent or willful violation of the Act's requirements. 15 U.S.C. § 1681n(a), 15 U.S.C. § 1681o; 15 U.S.C. § 1681m(h)(8). The States retain enforcement rights under the FCRA generally, 15 U.S.C. § 1681s(c), although the FCRA preempts state fair credit reporting laws to the extent they are inconsistent with the federal Act. 15 U.S.C. § 1681t. Accordingly, the State *amici* have a strong interest in the proper construction of provisions in the Act pertaining to "adverse actions" and "willfulness."

SUMMARY OF ARGUMENT

I. The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, requires users of credit reports to notify consumers when they have used a consumer's report to take any adverse action against him or her. 15 U.S.C. § 1681m(a). An adverse action, as the Act defines it, includes an increase in any charge for any insurance, existing or applied for. 15 U.S.C. § 1681a(k)(1)(B)(i). In determining whether it had taken an adverse action against a consumer based on his credit report, GEICO Companies

compared the rate it charged him based on his actual credit report with the rate it would have charged him if he had had a neutral or average credit score. Where, as in Edo's case, the rate charged would not have been higher based on consideration of an average credit score, GEICO determined that it had not taken an adverse action against the consumer and therefore did not provide an adverse action notice.

GEICO erroneously interpreted its duty to provide adverse impact notices. The purpose of the adverse action notification requirement is to alert consumers to potential mistakes in their credit reports so that they may investigate and, if appropriate, challenge the information. But GEICO's policy would not alert a person with good credit that he would have received a better insurance rate if he had had better credit, and thus would deny him an opportunity to correct any mistakes in his report. Nothing in the Act limits adverse actions to situations in which a person with an average or poor credit score is charged a higher insurance rate based in part on his report. Thus, a company takes adverse action against a consumer whenever a more favorable credit report would result in a lower insurance rate.

II. In the civil context, willfulness may encompass not only a knowing violation of the law, but also reckless disregard of whether one's conduct is unlawful. The context, structure, and purposes of the FCRA demonstrate that Congress intended a willful violation of the Act's requirements to include reckless disregard for the rights of consumers. That was an accepted view of the *mens rea* required for willful violation of civil statutes at the time

the FCRA was enacted. Moreover, when Congress wished to require a knowing violation, rather than mere willfulness, in order to impose liability, it used that term. The FCRA represents Congress's attempt to balance the benefits to users of consumer credit reports with the rights of consumers to notice and other protections. Construing willfulness to include a company's reckless disregard of a consumer's rights under the Act best effects that balance and Congress's intent.

III. Because some of GEICO's and Safeco's interpretations of their statutory duties to consumers were implausible, the Ninth Circuit properly determined that they were not entitled to summary judgment on the issue of whether they violated the Act's provisions willfully. Absent other evidence of willful noncompliance, when a company acts on an interpretation that is reasonable but erroneous, willfulness cannot be found. On the other hand, when a company reaches an implausible interpretation of its duties and that interpretation results in a violation of consumer rights, further inquiry into the company's subjective good faith is appropriate. Having received the benefit of use of consumer credit reports, a company should not escape liability for willful conduct, as a matter of law, based solely on its advancement of a "colorable" argument in support of its action. Requiring companies in a highly regulated industry to make a good faith attempt to determine its duties to consumers is not an onerous standard.

ARGUMENT

I. An insurance company takes an "adverse action" against a consumer whenever, after considering the consumer's credit report, it charges the consumer a higher rate than it would have charged, had the consumer's report been more favorable.

15 U.S.C. § 1681m(a) imposes on users of consumer credit reports the duty, among others, to provide notice to all consumers against whom they have taken an adverse action based in any part on information obtained in their consumer credit reports. During the relevant period in this case, the GEICO Companies deemed an action with respect to an individual's automobile insurance rates "adverse," therefore triggering the notice requirement, only if the rate charged was greater than it would have been if the individual's credit information had been neutral, meaning average. *Reynolds v. Hartford Financial Services Group*, 435 F.3d 1081, 1089, 1092-93 (9th Cir. 2006). The Ninth Circuit held that GEICO's interpretation and resulting policy violated the Act, because an adverse action takes place whenever a consumer (whose credit report was considered) would have been charged less for his insurance, had his credit information been more favorable. *Id.* at 1093. That followed, the Ninth Circuit reasoned, because those consumers with higher-than-average credit scores, as well as those with average or below-average scores, are entitled to know when a better rating would result in their being charged less for their insurance. *Id.*.

The Ninth Circuit was correct. The FCRA defines an "adverse action" to include, in part, "an increase in any

charge for [insurance] * * * applied for" based on the information in a credit report. 15 U.S.C. § 1681a(k)(1)(B)(i). Nothing in that language limits adverse actions to ones in which the consumer is charged a higher rate than he or she would have been charged, had the consumer had an above-average, rather than below-average, credit score. In other words, as the Ninth Circuit pointed out, a consumer is entitled to notice whenever he or she would have received a more favorable rate based on a better consumer credit report. In the cases of consumers with better-than-average credit reports, comparing the rates they are charged to the rates charged individuals with average credit scores ignores that those with excellent scores may nevertheless suffer higher rates than they should, based on mistakenly low credit ratings.

Construing "adverse actions" broadly to include all cases in which a consumer would have been charged less for his insurance, had his credit information been more favorable, is the only interpretation consonant with the purposes of the FCRA's notice requirements. Congress enacted the FCRA to protect consumers from flaws in the credit reporting system and to improve the integrity and reliability of credit reports. *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001); S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969). To those ends, the Act gives consumers the right to see their credit reports; sets forth procedures by which consumers may challenge and correct their reports; and requires that users of reports give affected consumers notice of any adverse actions taken based on the reports. 15 U.S.C. § 1681g; 15 U.S.C. § 1681i; 15 U.S.C. § 1681m(a). Under GEICO's narrow reading of "adverse action," a person may be charged more for his

or her insurance based on an inaccuracy in his or her credit report, yet never receive notice of that adverse action and thus never have reason to challenge or correct the report. Such a reading is not supported by the text of the Act, and it serves to defeat Congress's purpose of improving credit report reliability: An adverse-action notice may be the only practical way for a consumer to learn that the credit report used by the insurance company was erroneous and therefore take steps to correct it.

GEICO's contention that requiring adverse-action notices in situations like Edo's would confuse and desensitize consumers to the notices' import is unpersuasive. (*See* GEICO Br. 22). It is not difficult to tell a consumer that had his credit score been better, he would have received a better insurance rate. And if a consumer believes that he has impeccable credit, he is entitled to be alerted to the fact that his credit report reflects otherwise. Given that for most individuals, applying for or changing their insurance policies is not a daily occurrence, there is no genuine cause for concern that consumers will be flooded with too much information.

II. An insurance company that violates the FCRA in reckless disregard of a consumer's rights acts "willfully" for purposes of 15 § U.S.C. 1681n.

The Ninth Circuit also held that when an insurance company intentionally acts either with knowledge or in reckless disregard of a consumer's rights under the FCRA, its violation is willful, making it liable for punitive damages. *Reynolds*, 935 F.3d at 1098. The Ninth Circuit determined that that definition "best comports" with this Court's consistent statements in the context of

civil, as opposed to criminal, liability. *Id.* (citing, *e.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985)). Further, as the Ninth Circuit explained, that approach "best furthers the purposes and objectives of the Act." *Reynolds*, 935 F.3d at 1099. The court distinguished a negligent violation—"a truly excusable inability to predict future developments in the evolving construction of a statute by the courts"—from "noncompliance even though the answer to a previously undecided question is objectively apparent," which exhibits willfulness. *Id.*

That conclusion is also correct. First, as the Ninth Circuit observed, willfulness consistently has been construed differently, depending on whether that term is used in a civil or criminal context. In the civil context, willfulness means both knowing and reckless disregard of a defendant's legal obligations, particularly where the action is taken to enforce a party's compliance with duties designed to protect federal statutory rights. *See, e.g.*, *Thurston*, 469 U.S. at 128; *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (willful violation of Age Discrimination in Employment Act encompasses "reckless disregard for the matter of whether [a party's] conduct was prohibited"); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (same under Fair Labor Standards Act); *United States v. Illinois Cent. R. Co.*, 303 U.S. 239, 242-43 (1938) (in civil context, willful includes attitude of a defendant who is "plainly indifferent" to a statute's requirements). The Ninth Circuit's similar conclusion in the context of the FCRA is plainly consistent with those previous holdings.

Indeed, construing willful non-compliance to include reckless disregard of the Act's consumer protection provisions is compelled by the Act's text. Congress is presumed to have said what it meant and meant what it said. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Interpretations that render statutory language superfluous are disfavored. *Id.* at 253. In the case of the FCRA, when Congress wished to require proof of a knowing violation in order to impose liability, it did just that. *See, e.g.*, § 1681n(a)(1)(B) (imposing liability for actual and punitive damages to consumers for "obtaining a consumer report under false pretenses *or knowingly without a permissible purpose*"; emphasis added); § 1681n(b) (imposing liability for actual damages to consumer reporting agency not less than $1,000 on any person "who obtains a consumer report from a consumer reporting agency under false pretenses *or knowingly without a permissible purpose*"; emphasis added). Notably, in § 1681q, Congress provided criminal liability for "[a]ny person who *knowingly and willfully* obtains information on a consumer * * * under false pretenses." 15 U.S.C. § 1681q (emphasis added). Thus, Congress made a conscious choice to require *knowing and willful* conduct for purposes of criminal liability under that section, while determining that the lesser standard of willfulness—knowing *or reckless* disregard of consumer rights—is sufficient to establish civil liability for noncompliance under § 1681n(a).

That standard is also implicit in the structure of the FCRA. The Act imposes both benefits and responsibilities on users of consumer credit reports. Insurance companies may use consumer credit reports in determining

the rates it will charge to issue an insurance policy to an individual, 15 U.S.C. § 1681b (a)(3)(C), but in exchange, the company must notify individuals of any adverse action taken, based in some part on those reports. 15 U.S.C. § 1681m(a). When a company fails to comply with its statutory duties, it undermines Congress's goal to improve the accuracy and fairness of consumer credit reports. Additionally, it creates an imbalance of power between the company and the consumer. In that context, demanding a relatively high standard of care for violations of consumer rights makes sense. As part of a highly regulated industry, insurance companies should not be permitted to obtain the benefit of using consumer credit reports as permitted under the FCRA, while recklessly disregarding their statutory obligations to consumers at the risk of only minimal financial liability.

As the Ninth Circuit opined, to conclude otherwise would "create perverse incentives" for credit report users to pursue a policy of deliberate ignorance of the law in order to avoid liability for punitive damages. *Reynolds*, 435 F.3d at 1099. Under such a policy, an insurance company "could make the economic calculation that it is less expensive to simply ignore the law, stonewall consumers, and then pay compensatory damages for negligent violations that give rise to litigation, rather than open its eyes and pay the cost" of providing adverse-action notices to those entitled to them. *See Apodaca v. Discover Financial Services*, 417 F. Supp. 2d 1220, 1220 (D.N.M. 2006) (noting similar incentive for credit-reporting agencies). Congress clearly chose to impose liability for reckless disregard of consumer rights, because it provided damages for both negligent and willful

noncompliance. Given that "Congress did not intend to enable mass-users of credit reports to evade meaningful liability for repeated violations of their 'grave responsibilities' under the FCRA by sticking their heads in the sand and pleading ignorance of the law," such reckless disregard should be deemed willful, not merely negligent. *See Mathews v. Gov't. Employees Ins. Co.*, 23 F. Supp. 2d 1160, 1164 (S.D. Cal 1998).

III. To avoid further scrutiny into a company's subjective intent in violating a consumer's rights under the FCRA, the company must show that its interpretation of a previously unconstrued statutory requirement was reasonable, not merely "colorable."

The remaining question is when a company should be entitled to summary judgment based on lack of its willfulness in violating consumer rights under the FLCA. On that issue, the United States' *amicus* brief argues that the Ninth Circuit misapplied the correct standard for reckless disregard of consumer rights under the Act. According to the United States' *amicus* brief, "recklessness entails action or inaction 'in the face of an *unjustifiably high risk* of harm' or unlawfulness[.] (United States Br. 21) (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)) (emphasis added in United States' *amicus* brief). The United States argues that "reckless disregard in the civil context is, at bottom, an objective standard." (United States Br. 22). Further, that brief argues, the Ninth Circuit conflated the initial question of the objective reasonableness of GEICO's interpretation of an "adverse action" into the ultimate question of whether GEICO acted in subjective

good faith. (United States Br. 23-24). The United States *amicus* brief concludes that because "courts must undertake an objective inquiry to determine whether the defendant's conduct reflected a *colorable* interpretation of the law," and because the circumstances—including that the meaning of an "adverse action" was one of first impression—did not pose an objectively high risk that GEICO's interpretation of the FCRA's notice requirement was wrong, the trial court correctly granted the company summary judgment. (United States Br. 22, 29-30).

The State *amici* agree that recklessness requires, as an initial matter, an inquiry into the objective reasonableness of a party's conduct. *See, e.g, Farmer*, 511 U.S. at 836-37. But in this case, contrary to the United States' understanding, the Ninth Circuit *did* consider the objective reasonableness of GEICO's conduct, holding that "at least some of [the company's] interpretations [were] implausible." *Reynolds*, 435 F.3d at 1099. Having made that objective determination, the question before the court was what that meant for GEICO's summary judgment motion. The court determined that, because GEICO had reached at least some implausible interpretations of its statutory obligations, it was appropriate to remand to the district court to inquire further into the company's subjective good faith.[1] *Reynolds*, 435 F.3d at 1099.

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[1] Similarly, in Safeco's case, the Ninth Circuit held that the defendant companies' argument that their conduct was not willful failed in light of *Edo. Spano v. Safeco Corp.*, 140 Fed. Appx. 746, 2005 U.S. App. LEXIS 16308 (9th Cir. 2006).

Thus, the United States' disagreement with the Ninth Circuit does not appear to be so much with the order of inquiry—*i.e.*, whether to inquire into the objective reasonableness of the defendant company's conduct before examining its subjective good faith—as it is with what objective standard to apply to the company's interpretation of its statutory duties. As the United States' *amicus* brief points out, the Ninth Circuit indicated that where a company has "diligently and in good faith attempted to fulfill its statutory obigation and to determine the correct legal meaning of the statute and has thereby *come to a tenable, albeit erroneous, interpretation* of the statute," it "will not have acted in reckless disregard of a consumer's rights," as a matter of law. *Reynolds*, 435 F.3d at 1099. (Emphasis added). By contrast, in the apparent view of the United States, a company should escape liability for willful violation of a consumer's rights when, in the face of a requirement that has not previously been construed by a court, a company acts on a "colorable" interpretion of its duties. In the view of the State *amici*, in the specific context of the FCRA, as opposed to a criminal or some other civil action, the Ninth Circuit's rule is the better one.

As noted, the insurance industry is highly regulated. Like consumer reporting agencies, such users of reports have "grave responsibilities" under the FCRA. *See* 15 U.S.C. § 1681(a)(4). In light of the benefits that the Act accords users of reports, it is not overly onerous to require them to make a good faith effort to correctly determine their statutory responsibilities. In other words, although merely coming to an erroneous intepretation of such duties does not establish a willful violation of the

Act, a company's reliance on a flatly implausible interpretation of its duties should trigger further inquiry into its subjective good faith.

Requiring only a "colorable" argument that a company has fulfilled its statutory duties should not be the test, even when the interpretive question is one of first impression. That would give companies too much leeway to consciously avoid their responsibilities under the Act, no matter how clear, and risk only minimal damages until a consumer or other actor forces the issue to resolution through litigation. A "colorable" interpretation may be highly likely to be erroneous, thereby posing a high risk that, in acting on it, the company will violate consumer rights. Accordingly, proffering only a "colorable" interpretation should not be sufficient to foreclose a finding that a company violated consumer rights with reckless indifference to the law.

Finally, as the Ninth Circuit observed, further consideration of a company's subjective good faith will not always equate with a finding that it has violated the Act willfully. Upon further inquiry, a number of factors may come into play in making that determination, including whether the company justifiably relied on the advice of counsel, whether its violations of the Act were isolated, as opposed to an established policy affecting many consumers, whether its relationships with particular consumers evidenced a hostility to obeying the law, and how company executives reached the decision. *See Reynolds*, 435 F.3d at 1099. The only question at this stage, however, is whether an insurance company should be allowed to avoid statutory or punitive damages under § 1681n as

a matter of law because it offered a merely colorable (and wrong) interpretation of one of its duties under the FCRA. Because the FCRA's purposes of increasing the accuracy and reliability of consumer credit reports is best furthered by requiring credit report users to make a good faith determination of their statutory duties to consumers, the Ninth Circuit properly determined that neither GEICO nor Safeco was entitled to summary judgment.

Although numerous states have enacted, or may enact in the future, statutes intended to further fair credit reporting, the FCRA is this nation's central and primary mechanism for protecting consumer rights in the credit report arena. The responsibilities that the Act imposes on credit report users should be construed in a manner that takes into account the consumers' weighty interests in reports that are accurate and fairly compiled. Companies that do not make a good faith effort to comply with the Act's adverse-action notice requirement should not escape meaningful liability by acting on a strained and narrow interpretation of that responsibility. Reliance on an implausible and erroneous interpretation should be sufficient to trigger further inquiry into whether a company has violated the Act willfully.

CONCLUSION

For the reasons stated above, the Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
KAYE E. MCDONALD
Assistant Attorney General
Counsel for State of Oregon

December 18, 2006

APPENDIX

APPENDIX A

LIST OF THE AMICI CURIAE

State of Arizona
Terry Goddard
Attorney General of Arizona
1275 W. Washington Street
Phoenix, Arizona 85007

State of Arkansas
Mike Beebe
Attorney General of Arkansas
200 Tower Bldg.
323 Center Street
Little Rock, Arkansas 72201-2610

State of Delaware
Carl C. Danberg
Attorney General of Deleware
Carvel State Office Bldg.
820 N. French Street, Fifth Floor
Wilmington, Delaware 19801

District of Columbia
Eugene A. Adams
Interim Attorney General for the District of Columbia
John A. Wilson Bldg.
1350 PA Avenue NW, Suite 409
Washington, DC 20009

State of Hawaii
Mark J. Bennett
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

State of Illinois
Lisa Madigan
Attorney General of Illinois
James R. Thompson Ctr.
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601

State of Iowa
Tom Miller
Attorney General of Iowa
Hoover State Office Bldg.
1305 E. Walnut
Des Moines, Iowa 50319

State of Maryland
J. Joseph Curran, Jr.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202-2202

State of Minnesota
Mike Hatch
Attorney General of Minnesota
102 State Capitol
75 Rev Dr. Martin Luther King, Jr. Blvd.
St. Paul, Minnesota 55155-1609

State of Missouri
Jeremiah W. (Jay) Nixon
Attorney General of Missouri
Supreme Ct. Bldg.
207 W High Street
Jefferson City, MO 65101

State of Montana
Mike McGrath
Attorney General of Montana
Justice Building
215 North Sanders
P.O. Box 201401
Helena, Montana 59620-1401

State of New York
Eliot Spitzer
Attorney General of New York
Department of Law
The Capitol, 2nd Floor
Albany, New York 12224

State of Ohio
Jim Petro
Attorney General of Ohio
State Office Tower
30 E Broad Street, 17th Floor
Columbus, Ohio 43215

State of Oklahoma
W.A. Drew Edmondson
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105-4894

State of South Carolina
Henry McMaster
Attorney General of South Carolina
Rembert C. Dennis Office Building
P.O. Box 11549
Columbia, South Carolina 29211-1549

State of South Dakota
Larry Long
Attorney General of South Dakota
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501

State of Tennessee
Robert E. Cooper Jr.
Attorney General of Tennessee
500 Charlotte Avenue
P.O. Box 20207
Nashville, Tennessee 37202-0207

State of Utah
Mark L. Shurtleff
Attorney General of Utah
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, Utah 84114-2320

State of Vermont
William H. Sorrell
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609-1001

State of West Virginia
Darrell V. McGraw Jr.
Attorney General of West Virginia
State Capitol, Room 26-E
1900 Kanawha Blvd. E.
Charleston, West Virginia 25305

State of Wisconsin
Peggy A. Lautenschlager
Attorney General of Wisconsin
114 East, State Capitol
P.0. Box 7857
Madison, Wisconsin 53707-7857

State of Wyoming
Patrick J. Crank
Attorney General of Wyoming
123 State Capitol Bldg.
Cheyenne, Wyoming 82002

6384

Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR, *et al.*,

Respondents.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SUSAN M. POPIK
Counsel of Record
MERRI A. BALDWIN
CHAPMAN, POPIK & WHITE LLP
650 California Street, 19th Floor
San Francisco, California 94108
(415) 352-3000
Attorneys for Amicus Curiae

204755

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Property Casualty Insurers Association of America ("PCI") respectfully submits this *amicus curiae* brief in support of petitioners GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company; and Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon (collectively "petitioners").[1]

INTEREST OF *AMICUS CURIAE*

PCI is a trade group dedicated to representing its member companies' interests before governmental bodies and state and federal courts. PCI's members include more than 1,000 property and casualty insurance companies that together account for $184 billion in direct written premiums, including 52% of all personal auto premiums and 39.6% of all homeowners premiums written in the United States.

PCI is familiar with the issues involved in this case, including the issues raised in petitioners' briefs. As those briefs demonstrate, this case presents several issues of first impression relating to the interpretation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, each of which is of critical importance to PCI's members and to the insurance industry as a whole. PCI and its member companies thus have a substantial interest in the outcome of the present action.

In PCI's view, one aspect of the Ninth Circuit's opinion in particular bears further briefing: the required contents of a valid adverse action notice under 15 U.S.C. § 1681m. PCI believes

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1. No counsel for any party authored this *amicus* brief in whole or in part, and no person or entity other than PCI made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this *amicus* brief, and their letters are on file with the Clerk of this Court.

its *amicus* brief will be helpful to the Court in offering a somewhat different approach to this issue than do the parties' briefs and in providing data that underscore the significant negative consequences to the insurance industry and the insurance-buying public if the Ninth Circuit's opinion is allowed to stand.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion fashions entirely new content requirements for adverse action notices that threaten the very solvency of the insurance industry. These unprecedented requirements are unsupported by any authority and conflict with both the express language of 15 U.S.C. § 1681m ("section 1681m") and Federal Trade Commission directives written for the express purpose of advising insurers of their obligations under FCRA. These new notice requirements are vague in their scope and application and, given the realities of modern insurance underwriting practices, may be virtually impossible for insurers to satisfy. Moreover, imposition of these requirements threatens the insurance industry with potentially ruinous penalties and the prospect of continued litigation, especially when combined with the court of appeals' expansive, and erroneous, definition of "willfulness."

The detailed notice requirements adopted by the Ninth Circuit will also thwart one of Congress's primary objectives in enacting FCRA, which is to provide consumers with clear, intelligible information concerning their credit reports.

ARGUMENT

A. The "Minimum Requirements" for a Valid Adverse Action Notice Announced by the Ninth Circuit Are Not Supported by the Statutory Language and Are Inconsistent with the Governing Agency's Interpretation.

According to the Ninth Circuit's opinion, in order to comply with section 1681m, an adverse action notice must, "at a minimum, . . . communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action." *Reynolds v. Hartford Fin. Serv. Group, Inc.*, 435 F.3d 1081, 1095 (9th Cir. 2006); *see id.* at 1100. These hitherto unknown requirements conflict with the express language of the statute, run afoul of the dictates of prior case law, and are patently inconsistent with Federal Trade Commission advisory directives written specifically to inform insurers of their obligations under FCRA.

1. The Ninth Circuit's Interpretation of Section 1681m Conflicts with the Statutory Language and Has No Support in the Case Law.

The dual purposes of FCRA are to ensure the accuracy and fairness of credit reporting. 15 U.S.C. § 1681(a). More specifically, the Act is "intended to safeguard against the improper reporting of information on a credit report (either by the credit reporting agency or by the furnisher of credit information) and against the improper disclosure of a credit report." *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1074 (9th Cir. 2001); *see* 15 U.S.C. § 1681(b) (noting that one of FCRA's purposes is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . information in a manner which is fair

and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information").

In aid of this goal, section 1681m sets forth specific requirements for users of consumer reports. That section provides that any person who takes adverse action based in whole or in part on information contained in a "consumer report"[2] shall issue provide three specific types of information to the consumer, in "oral, written, or electronic" form: (1) notice of the adverse action; (2) contact information for the consumer reporting agency (together with a statement that the reporting agency did not make the decision to take the adverse action and cannot provide information concerning the action); and (3) notice of the consumer's right to obtain a copy of the consumer report and to dispute the accuracy or completeness of any information in the report.[3] 15 U.S.C. § 1681m.

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2. The Act broadly defines "consumer report" as any communication by a consumer reporting agency "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used . . . as a factor in determining the consumer's eligibility for," among other things, "insurance . . . to be used primarily for personal, family, or household purposes[.]" 15 U.S.C. § 1681a(d)(1).

3. Section 1681m(a) provides:

> If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall–
>
> (1) provide oral, written, or electronic notice of the adverse action to the consumer;
>
> (2) provide to the consumer orally, in writing, or electronically–

(Cont'd)

In considering whether the adverse action notices at issue here met these requirements, the Ninth Circuit went well beyond the mandate of the statute. Rather, as noted above, the court concluded that a valid notice must, "at a minimum," specifically state that an adverse action was taken; "describe" the action; "specify the effect" of the action on the consumer; and "identify the party or parties taking the action, and their respective role." *Reynolds*, 435 F.3d at 1095; *see id.* at 1100. None of these content requirements is found in section 1681m itself, and none can fairly be implied from the language of the statute. Further, the court imposed these requirements on its own, without any party briefing the issue.

(Cont'd)

> (A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and
>
> (B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and
>
> (3) provide to the consumer an oral, written, or electronic notice of the consumer's right–
>
> (A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and
>
> (B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

In support of its holding, the Ninth Circuit cited only *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir. 1983), a case that has virtually nothing to do with the issues involved here. In that case, Fischl applied for credit to finance the bulk of the purchase price of an automobile. The credit application was referred to General Motors Acceptance Corp. ("GMAC"), which obtained a consumer report on Fischl. After reviewing the application and consumer report, GMAC determined that credit should not be extended. It then sent Fischl a form letter advising him that his application had been rejected on the ground that "credit references are insufficient." In the portion of the letter designed to disclose the use of information from outside sources, GMAC marked "disclosure inapplicable." *Id.* at 145. Fischl subsequently learned that GMAC had in fact obtained his credit information and filed suit under FCRA.

Not surprisingly, the Fifth Circuit held that GMAC's purported notice failed to comply with section 1681m, since it misleadingly stated "disclosure inapplicable" instead of informing Fischl that GMAC had in fact relied on a consumer report in denying Fischl's loan application. *Id.* at 150. But that is all the *Fischl* opinion says: Other than to make plain that an adverse action notice cannot contain *untrue* information, the case does not even address the required content of such a notice – much less hold that an adverse action notice is invalid unless it contains the specific and detailed information required by the Ninth Circuit. Indeed, other than the Ninth Circuit here, no court in the country has ever interpreted section 1681m to impose such onerous requirements.

2. The Ninth Circuit's Interpretation of Section 1681m Conflicts with That of the Federal Trade Commission, the Agency Charged with Enforcing FCRA.

In 1996, Congress enacted amendments to the FCRA which directed the Federal Trade Commission ("FTC") – the

agency primarily responsible for enforcing FCRA (*see* 15 U.S.C. § 1681s(a); *Fischl*, 708 F.2d at 149 n.4) – to prescribe the content of notices and to provide a sample notice for users of credit reports. 15 U.S.C. § 1681e(d)(2). In response, the FTC has specifically addressed what information an insurer must provide a consumer in an adverse action notice. In stark contrast to the Ninth Circuit's interpretation, both the FTC's regulations and its advisory materials essentially track the express language of the statute and state that, to be effective, an insurer's adverse action notice need only include "the name, address, and telephone number" of the agency supplying the report; "a statement that the credit reporting agency that supplied the report did not make the decision to take its adverse action"; and a notice of the consumer's right to dispute the information. *See* 16 C.F.R. Part 601, App. C.; "FTC Facts for Business: Consumer Reports – What Insurers Need to Know" (FTC October 1998) (reproduced at PCI's Appendix ("PCI App.") at 1a); *see also* FTC Staff Opinion Letter, dated November 10, 1998, PCI App. at 4a (opining that section 615(a) of FCRA requires adverse action notices to contain "only the information specified" in the statute). Although this interpretation is not technically binding,[4] this Court has often held that considerable

4. In *Fischl*, the Fifth Circuit summarized the FTC's role in interpreting FCRA as follows:

> Although it does not possess substantive rule-making power, the FTC is authorized to enforce the FCRA, "except to the extent that enforcement . . . is specifically committed to some other government agency under [§ 1681s(b)]. . . ." §15 U.S.C. 1681s(a). . . . Due to the absence of express statutory authority to issue binding interpretations of the FCRA, which effectively deprives any such interpretation of the force of law, opinions disseminated by the FTC, whether in the form of its compliance manual or unofficial staff letters, are intended only to clarify the FCRA and are advisory in nature. *These opinions may nonetheless offer helpful guidance to the courts.*

708 F.2d at 149 n.4 (emphasis added).

respect should be accorded the "interpretation given [a] statute by the offices or agencies charged with its administration." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (quoting *Udall v. Tallmar*, 380 U.S. 1, 16 (1961)).

Prior to the decision below, no court had ever suggested, much less held, that an adverse action notice must contain the detailed content required by the Ninth Circuit. Nor can such a requirement be gleaned from a fair reading of FCRA itself. To the contrary, the only source of specific information concerning the "official" interpretation of this aspect of FCRA – the FTC's regulations and the advisory materials written specifically for insurers – detail a much simpler and straightforward response to consumers in the event of adverse action.

B. The Ninth Circuit's Notice Requirements Do Not Further FCRA's Purposes and Impose an Unreasonable Administrative and Economic Burden on Insurers.

As noted above, one of the primary goals of section 1681m is "to promote the accuracy of information in a consumer credit report." *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1334 (9th Cir. 1995); *see* 15 U.S.C. §§ 1681(a), (b). The Ninth Circuit's newly imposed "minimum" requirements are of no assistance whatever in achieving that end. To the contrary, and in contrast to the statutory requirements, the Ninth Circuit's requirements will serve only to deluge consumers with a quantity of information far removed from that intended by Congress – specifically, information designed to enable them to determine whether their credit information is accurate and, if not, how to correct it. At the same time, the new requirements impose an enormous operational burden on insurers.

Take, for example, the Ninth Circuit's requirement that the notice "specify the effect of the [adverse] action upon the consumer." *Reynolds*, 435 F.3d at 1095. This requirement is

impermissibly vague in scope and application, since it is impossible to determine what the phrase "specify the effect" means or what level of detail is necessary to satisfy this criterion.[5] Moreover, assuming an insurer could overcome this threshold hurdle, the complexities of modern insurance underwriting are such that many insurers will simply be unable to provide the information apparently required by the Ninth Circuit – or at least to do so in a form that consumers will understand.

To be sure, some insurers may use credit information in such a straightforward way that the "effect" of the adverse action will be easy to discern and explain – such as when an insured's premium rate is increased solely and directly because of information in his or her credit report. More often, however, the role of consumer reports in the rating process is much more complicated and nuanced, having both direct and indirect ramifications.

Insurance companies calculate premiums using various underwriting or rating factors. These factors can be affected in numerous ways by information contained in consumer reports. For example, many insurers use consumer report information to calculate an "insurance score," which is then used to place an applicant in a basic risk category or "tier," such as "preferred," "standard," or "nonstandard." Each of these tiers may have associated rating factors and may also, in turn, determine what other rating parameters are applied. Thus, the fact of a speeding violation (information that itself comes from a consumer report) may affect the "preferred" risk tier differently than the "nonstandard" risk tier. Similarly, an applicant's insurance score may determine whether an applicant is eligible for certain discounts or surcharges and, if so, the amount of those discounts and surcharges. This interaction among the various factors that

5. Thus, far from providing guidance as to FCRA compliance, the Ninth Circuit's notice requirements threaten to open a Pandora's box of new litigation.

go into the setting of premiums could make it literally impossible for an insurer to "specify the effect" of the "action" taken as a result of information derived from an individual policyholder's consumer reports.

The problem is further complicated by the fact that insurers may use information from a number of consumer reports (e.g., credit reports, motor vehicle reports, and others) in setting a premium or determining eligibility for coverage, making any meaningful explanation of the "effect" of the reports virtually impossible. Suppose, for example, a policyholder has "good" credit (as derived from a credit report) and one speeding violation. Through sophisticated statistical techniques, an insurer might be able to derive the *overall* rate impact of these two factors combined, but not be able to separate the impact of the good credit, on the one hand, and the speeding violation, on the other. Just how is the carrier to "specify the effect" of its action in these circumstances? And how is the consumer to understand this information as provided?

Similarly, the Ninth Circuit's requirement that an adverse action notice "identify the party or parties taking the action and their respective roles" has little to do with the ultimate aim of alerting consumers to their right to inspect their credit reports and, ultimately, to ensure accurate reporting. Because this new requirement could be read to require independent notices from affiliated companies, many consumers would receive multiple notices, as well as lengthier and more complex notices.

The end result is that, to satisfy the Ninth Circuit's notice requirements, insurers may be forced to provide consumers with an extremely complicated description of their underwriting practices, corporate structure and business practices. As noted by this Court in the context of disclosures required by the Truth in Lending Act, "meaningful disclosure does not mean more disclosure." *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555,

568 (1980). Far from requiring clear, intelligible information designed to assist a consumer in determining whether his or her credit information is accurate and to correct it if it is not, the Ninth Circuit's opinion mandates a form of notice that is so complex and detailed that the key information contemplated by the statute will be all but lost.

C. The Decision Below Seriously Threatens the Continued Availability and Affordability of Personal Lines Insurance.

The Ninth Circuit's notice requirements could have a potentially devastating impact on the insurance industry, since insurers have for years sent out notices that could be construed to fall short of the Ninth Circuit's newly-minted requirements. Combined with the broad standard of "willfulness" adopted by the court (discussed further below), the Ninth Circuit's notice requirements could subject many insurers to statutory liabilities of staggering proportions.

According to industry data, it is estimated that, in 2005, the number of personal lines policies subject to credit scoring (including both new business and renewals) exceeded 71.5 million.[6] While there are no data stating how many adverse action

---

6. This figure was derived using public information, beginning with the latest personal auto and homeowners exposure counts from the National Association of Insurance Commissioners for those states where credit information is allowed. Because each insured automobile constitutes an "exposure," even though more than one auto may be insured on a single policy, the total number of "exposures" was extrapolated and converted into policy counts using data from the Federal Highway Administration and the U.S. Census Bureau. The total policy counts (176.4 million) were then reduced to include only those policies for which credit history was examined. The factors used to generate the final numbers and their sources are as follows:

- Proportion of companies known to use insurance scoring - Michigan Office of Financial and Insurance Services;

(Cont'd)

notices insurers sent during this same time period, it may conservatively be assumed that approximately 50% of these policies triggered such notices.[7] Based on these assumptions, insurers sent some 35.7 million adverse action notices in 2005 alone, *not* including those sent when an application was denied. Assuming that similar numbers of adverse action notices were sent in each of the past five years, carriers have sent approximately 178.5 million adverse action notices since 2001 – many of which could conceivably be vulnerable to *ex post facto* scrutiny based on the Ninth Circuit's newly imposed notice requirements.

(Cont'd)

- Percentage of the largest auto companies using credit scoring models - Conning & Company;
- Percentage of companies using credit data on new business - Conning & Company;
- Retention ratios (applied to develop breakdown between new business and policy renewals) - Ward Financial Group; and
- Frequency with which renewal policy counts are subject to credit (three years) - National Conference of Insurance Legislators' Model Act Regarding Use of Credit Information in Personal Insurance

These percentages and ratios were then applied to the total policy counts to determine the estimated new and renewal policies affected by the use of credit-based insurance scoring.

7. These percentages obscure the fact that, generally speaking, the use of credit information and other consumer reports enables carriers to charge *lower* rates overall than would otherwise be the case. Thus, a carrier's actions in an individual case might trigger an adverse action notice (e.g., where the applicant's credit standing results in an "increased" premium), even though the applicant is charged less than if the carrier had calculated the premium using a different set of factors that did not include credit information.

FCRA provides for statutory damages of between $100 and $1000 per willful violation. 15 U.S.C. § 1681n(a). The Ninth Circuit's overreaching interpretation of FCRA's notice requirements thus potentially exposes the insurance industry to statutory damages alone (not including punitive damages) that could threaten the solvency of many insurers and negatively affect the continued availability and affordability of personal lines insurance. Even without more, but especially in light of these potentially devastating consequences, the Ninth Circuit's erroneous and unsupported interpretation of FCRA's notice requirements should not be allowed to stand.

D. The Ninth Circuit's Conclusions on Notice and Willfulness Are Inconsistent with FCRA's Intent and Threaten to Subject the Insurance Industry to Potentially Crippling Penalties.

Violations of FCRA, including the failure to comply with the adverse action notice requirements of section 1681m(a), subject the users of consumer reports to a variety of civil damages and penalties. "Negligent noncompliance" subjects a user to liability for actual damages sustained by the consumer as a result of the noncompliance, plus court costs and attorney fees in the event of successful litigation. 15 U.S.C. § 1681o(a). If the noncompliance is "willful," the user is additionally liable for statutory damages of between $100 and $1,000 per consumer, and may be liable for punitive damages as well. *Id.* § 1681n(a).

As explained by petitioners, the Ninth Circuit's adoption of a "reckless disregard" standard of willfulness blurs the distinction between negligent and willful conduct and is therefore contrary to this Court's prior holdings.[8] Even were

8. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 129-30 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988), both of which hold that mere negligence does not equal willfulness.

that not so clearly the case, other circuits have concluded – correctly – that the level of culpability required to constitute "willfulness" under FCRA is much higher than mere recklessness, reserving its application to situations in which the defendant *knew* the challenged conduct to be unlawful. *See, e.g., Phillips v. Grendahl*, 312 F.3d 357, 368, 370 (8th Cir. 2002) (noting that "the statute's use of the word 'willfully' imports the requirement that the defendant *know* his or her conduct is unlawful" and that "willful noncompliance under section 1681n requires *knowing and intentional* commission of an act the defendant knows to violate the law" (emphasis added)); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) ("[I]n order to incur civil liability for operating under false pretenses, a party must act willfully and purposefully 'with a motivation to injure.' [Citation.] This interpretation comports with the language of § 1681n . . . ."). Indeed, the Ninth Circuit specifically acknowledged this authority but opted to follow the "reckless disregard" standard adopted by the Third Circuit in *Cushman v. Trans Union Corp.*, 115 F.3d 220, 229 (3d Cir. 1997).[9] *Reynolds*, 435 F.3d at 1098.

The Ninth Circuit's erroneous interpretation of the term "willfully" should be rejected. If the Ninth Circuit's "reckless disregard" standard were to be applied to all aspects of FCRA compliance, including the content of adverse action notices, major segments of the insurance industry could be subjected to potentially ruinous statutory and punitive damages resulting from the routine – and long-approved – use of consumer reports. The alternative is that insurers may be dissuaded from using consumer reports altogether, which would *increase* the cost of insurance to consumers.[10]

---

9. Although declining to adopt an "actual knowledge" standard, the *Cushman* court was at least careful to point out that, to be actionable as a "willful" violation, the defendant's conduct "must be on the same order as willful concealments or misrepresentations." *Cushman*, 115 F.3d at 227. The Ninth Circuit has not similarly qualified its holding.

10. *See* note 7 above.

These potential results are far removed from Congress's intent in enacting FCRA, which specifically authorizes the use of consumer reports in the underwriting of insurance. *See* 15 U.S.C. § 1681b. At the same time, the effect of the Ninth Circuit's notice requirements is to seriously disrupt the ability of insurers to do business and, in the final analysis, to harm the very consumers that FCRA was enacted to protect.

CONCLUSION

For all the reasons discussed above and in the briefs submitted by petitioners, this Court should reverse the judgments below and remand for reinstatement of the judgments in favor of petitioners.

Respectfully submitted,

SUSAN M. POPIK
Counsel of Record
MERRI A. BALDWIN
CHAPMAN, POPIK & WHITE LLP
650 California Street, 19th Floor
San Francisco, California 94108
(415) 352-3000
Attorneys for Amicus Curiae

APPENDIX

APPENDIX A – "FTC FACTS FOR BUSINESS: CONSUMER REPORTS – WHAT INSURERS NEED TO KNOW" (FTC OCTOBER 1998)

FTC FACTS for Business

Consumer Reports ☑

What Insurers Need to Know

s an insurer, you may use consumer reports to underwrite insurance policies and to screen high-risk applicants — as long as you comply with the Fair Credit Reporting Act (FCRA).

he Act

e FCRA is designed to protect the privacy of consumer report ormation and to guarantee that the information supplied by credit porting agencies (CRAs) is as accurate as possible. Consumer reports y include information on an applicant's credit history, medical nditions, driving record, criminal activity, and hazardous sports. nendments to the FCRA, which went into effect September 30, 1997, rease the legal obligations of insurers who use consumer reports.

The Adverse Action Notice

The following disclosure requirement applies to new applicants as well as current policy holders. When an adverse action is taken—such as a decision to deny insurance, increase rates, or terminate a policy—and it is based solely or partly on information in a consumer report, Section 615(a) of the FCRA requires you to provide a notice of the adverse action to the consumer. The notice must include:

- ✓ the name, address, and telephone number of the CRA that supplied the consumer report, including the toll-free telephone number for credit bureaus that maintain files nationwide;
- ✓ a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give the specific reasons for it; and
- ✓ a notice of the individual's right to dispute the accuracy or completeness of any information the CRA furnished, and the consumer's right to a free report from the CRA upon request within 60 days.

Disclosure of this information is important because some consumer reports may contain errors. The adverse action notice is required even if information in the consumer report was not the main reason for the denial or rate increase. Even if the information in the report played only a small part in the overall decision, the applicant still must be notified.

While written adverse action notices are not required, many insurers provide them and keep copies for two years to show compliance with the FCRA.

Examples

The following examples illustrate situations where the adverse action notice must be given to insurance applicants.

A life insurance company orders a consumer report from a CRA, such as the Medical Information Bureau (MIB). Information contained in the MIB report leads to further investigation of the applicant. The application for insurance is rated or declined in whole or in part because of information obtained from the investigation.

Section 604(g) of the FCRA requires an insurance company, or any other user of medical information, to get the consumer's consent — orally, electronically, or in writing — before obtaining medical information. That means the life insurance company in this situation would have to get the consumer's consent before obtaining the consumer report from the MIB. In addition, since the MIB report formed part of the basis for the adverse decision in this case, the full Section 615(a) adverse action notice described above must be sent to the consumer.

A person with an unfavorable credit history, such as a bankruptcy, is denied automobile insurance at standard rates. Although the credit history was considered in the decision, the applicant's limited driving experience was even more important.

The applicant is entitled to the Section 615(a) adverse action notice because the credit report played a part, however minor, in the insurer's decision to charge a higher premium.

BEST AVAILABLE COPY

Non-compliance with the FCRA

There are legal consequences for insurers who fail to get an applicant's permission before requesting a consumer report or who fail to provide required disclosure notices. The FCRA allows individuals to sue insurers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue insurers for non-compliance and obtain civil penalties.

For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft, and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

APPENDIX B – FTC STAFF OPINION LETTER, DATED NOVEMBER 10, 1998

Federal Trade Commission (F.T.C.)
Division of Financial Practices

Fair Credit Reporting Act

Staff Opinion Letter

November 10, 1998

Mr. Ronald L. Sheffield

Special Assistant Commissioner, Consumer Affairs

Arkansas Insurance Department

1200 West Third Street

Little Rock, AR 72201-1904

Dear Mr. Sheffield:

This will respond to your letter inquiring about the applicability of the Fair Credit Reporting Act ('FCRA") to an insurance company's denial of insurance to an applicant based on information contained in a consumer report. You ask two specific questions: (1) does the FCRA require an insurance company to disclose to an applicant what specific information in the credit report was relied on in denying insurance to that applicant; (2) if not, would the insurance company violate the FCRA by voluntarily disclosing such information to the applicant. The answer is 'no" to both questions.

Section 615(a) of the FCRA sets forth the information that must be disclosed to a consumer by any person taking adverse action [FN1] with respect to that consumer based in whole or in part on any information contained in a consumer report. That section requires disclosure of only the information specified, namely:

1. Notice (either oral, written, or electronic) of the adverse action;

2. The name, address, and telephone number of the consumer reporting agency ('CRA") from whom the report was obtained. If the CRA compiles and maintains files on consumers on a nationwide basis, the person must disclose a toll-free number for the CRA, which the CRA is required to establish;

3. A statement that the CRA did not make the decision to take the adverse action and is unable to provide the specific reasons why the action was taken; and

4. Notice of the consumer's right to obtain a free copy of his or her consumer report from the CRA and to dispute the accuracy or completeness of any information in a consumer report furnished by the CRA.

The FCRA does not require insurers to disclose specific reason(s) for

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taking adverse action, or to identify information from a consumer report that contributed to the action. Instead, it provides the consumer with the right to obtain a copy of all the information in his or her CRA files. From the required notice (item #4, above), consumers who suffer adverse action will know of their right to obtain that data without charge. However, should an insurer or other person wish to tell a consumer the reason(s) for the adverse action, nothing in the FCRA precludes that person from doing so. [FN2]

This is an informal staff opinion and is not binding on the Commission.

Sincerely,

Ronald G. Isaac

Attorney

[FN1]. With respect to the underwriting of insurance, Section 603(k)(1)(B)(i) of the FCRA defines 'adverse action" to mean 'a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable-change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

[FN2]. Section 607(c) forbids CRAs from prohibiting insurers or other consumer report users from providing consumers against whom they have taken adverse action with copies of their reports.

1998 WL 34323720 (F.T.C.)

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Nos. 06-84 & 06-100

In the

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, et al.,
Petitioners,

v.

CHARLES BURR, et al.,
Respondents.

GEICO GENERAL INSURANCE COMPANY, et al.,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR *AMICUS CURIAE* TRANS UNION LLC IN SUPPORT OF PETITIONERS

MICHAEL O'NEIL
Counsel of Record
ROGER L. LONGTIN
PETER J. DONOGHUE
ALBERT E. HARTMANN
DLA Piper US LLP
203 North LaSalle Street
Suite 1900
Chicago, Illinois 60601
(312) 368-4000

Midwest Law Printing Company/Photex — Chicago — (312) 431-0185

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INTEREST OF AMICUS CURIAE

With the consent of all parties[1] *amicus curiae*, Trans Union LLC ("Trans Union"), submits it brief in support of petitioners Safeco Insurance Company of America, *et al.* and GEICO General Insurance Company, *et al.* ("Petitioners").

Trans Union is a Delaware limited liability company with businesses that operate as a "consumer reporting agency," as that term is defined under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), and which is more commonly known as a credit bureau. Trans Union's consumer reporting database contains approximately 3.7 billion items of information, associated with approximately 200 million consumers throughout the United States. These items consist of "tradelines" from credit grantors ("tradeline" is an industry term for the current and historical activities of a particular consumer's account with a particular credit grantor), and public record items from public records sources. Each month, Trans Union receives over 2 billion updates/additions to the items in its database. These updates come from approximately 85,000 different sources (called "furnishers"), including banks, credit card companies, mortgage companies, collection agencies, and other financial institutions. *See, e.g., Benson v. Trans Union, LLC*, 387 F. Supp. 2d 834, 841 (N.D. Ill. 2005) (noting vast scale of information received and processed by Trans Union).

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[1] Letters from petitioners and respondents memorializing the consent to the filing of *amicus curiae* briefs by any entity have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief.

Trans Union, Equifax Information Services, LLC, and Experian Information Solutions, Inc.—the nation's three largest "consumer reporting agencies," or CRA's, as that term is defined in the FCRA, 15 U.S.C. § 1681a(f)—collectively issue more than 1 billion consumer reports to third parties each year, and issued 57.4 million file disclosures to consumers in 2003. FTC & Bd. of Governors of the Fed. Reserve Sys., *Rep. to Cong. on the Fair Credit Reporting Act Dispute Process*, at 2-3 (Aug. 2006) (citations omitted).[2]

Trans Union maintains files on residents of all 50 States, and employs procedures which apply across its national operations. Trans Union has approximately 4,000 employees.

Trans Union submits this brief in support of the Petitioners because the consumer credit reporting activities of Trans Union are extensively regulated by the FCRA. Moreover, because the FCRA is directed primarily at regulating CRA's, and not their clients (like the Petitioners here), the Ninth Circuit's erroneous ruling as to the standard for establishing a "willful" violation of the FCRA, 15 U.S.C. § 1681n, greatly impacts Trans Union. Finally, Trans Union respectfully submits that consideration of the unique statutory scheme which imposes duties on CRA's will further demonstrate the error of the Ninth Circuit's ruling on the issue.

The Petitioners collectively raise two issues. The arguably more narrow issue involves review of the Ninth Circuit's determination that certain uses, and the consequences of those uses, of consumer credit data by personal lines insurers constitute "adverse action," as that term is defined in the FCRA, thereby triggering the insurers' duty to provide adverse-action notices under 15

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[2] Available at <http://www.ftc.gov/os/comments/fcradispute/P044808fcradisputeprocessreporttocongress.pdf>.

U.S.C. § 1681m. The obligation on users of "consumer report" information to provide adverse-action notices is one of the few significant duties imposed on customers of CRA's. *See generally* 15 U.S.C. § 1681m ("Requirements on users of consumer reports"). Notably, by the 2003 amendments to the FCRA, Congress eliminated the private right of action to bring claims for violations of Section 1681m, such as the failure to provide adverse-action notices. *See* 15 U.S.C. § 1681m(h)(8)(A); *Perry v. First Nat'l Bank*, 459 F.3d 816, 823 (7th Cir. 2006).

The larger issue, and one which more directly impacts Trans Union and other CRA's, is the Ninth Circuit's ruling, in conflict with the holdings of other Circuits that have considered the issue, that a defendant can be found to have "willfully" violated the FCRA where it relies upon what is later viewed to be an "unreasonable" interpretation of the statute. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006). Given the impact on Trans Union if the Ninth Circuit's ruling were to be upheld, Trans Union respectfully submits this brief to offer a perspective on the statute that the parties likely will not offer.

As originally enacted, the regulatory focus of the FCRA was on CRA's like Trans Union. As part of its legislative findings, Congress noted that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(3). Congress further expressly stated that the purpose of the FCRA was "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce . . . in a manner which is fair and equitable to the consumer." 15 U.S.C. § 1681(b). Much more recent amendments to the FCRA have imposed certain duties on data furnishers and users of data reported by credit bureaus and other CRA's. Nonetheless, the statute

remains primarily focused on regulating the business operations of CRA's.

The FCRA also permits consumers to sue CRA's for the violation of "any requirement imposed under" the FCRA. 15 U.S.C. §§ 1681n(a), 1681o(a). Where a CRA has been "negligent in failing to comply with any requirement," the FCRA expressly provides for an award of "any actual damages sustained by the consumer as a result of the failure," as well as an award of attorneys' fees. § 1681o(a). Where a CRA is found to have "willfully" violated "any" of its statutory duties, it is liable for "actual damages" or, alternatively, "damages of not less than $100 and not more $1,000," and punitive damages, as well as attorneys' fees. § 1681n(a). These remedial provisions, which arguably guarantee a minimum recovery of up to $1,000 for "any" willful violation of the FCRA and attorneys' fees, have encouraged plaintiffs, and their lawyers, to bring claims for willful violations of the FCRA on behalf of putative classes. *See* David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006) (noting "proliferation of class action lawsuits" brought under FCRA in recent years).[3]

The possible "crushing liability" engendered by this remedial statutory scheme was noted by Justice Kennedy (and joined by Justice O'Connor) in their dissent to this Court's denial of certiorari in *Trans Union LLC v. FTC*, 536 U.S. 915, 917 (2002). There, Justice Kennedy questioned the District of Columbia Circuit's rejection of the First Amendment challenge to the Federal Trade Commission ("FTC") decision that Trans Union's target marketing lists constituted "consumer reports" subject to the full panoply of duties imposed by the FCRA. *Id.* at

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[3] The statute does not expressly provide for class action prosecution of FCRA violations, and therefore does not contain a cap on class action liability.

916. Justice Kennedy's opinion also underscores the problems associated with implementing the provisions of the FCRA when he noted that the FTC's interpretation of the statute at issue was "nonsensical." *Id.* at 917. Justice Kennedy also noted the "important practical implications" of the FTC ruling, in light of the "series of class actions" purportedly brought on behalf of 190 million individuals: "Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion . . . The company's demise will have adverse effects on both the national economy and petitioner's thousands of employees." *Id.*

SUMMARY OF ARGUMENT

This Court should reverse the court of appeals' decision which blurs the differing "state of mind" requirements in the civil liability provisions of the FCRA, and which ignores the statutory scheme as a whole. Although the particular claims at issue here involve the obligations of users of FCRA information to advise consumers of "adverse action," the FCRA primarily regulates "consumer reporting agencies" like Trans Union. Therefore, as this Court has previously noted, comprehensive regulatory statutes like the FCRA must be interpreted in harmony with the overall regulatory scheme, and its focus on CRA's.

The FCRA requires credit bureaus like Trans Union to implement balanced procedures which, on the one hand, will facilitate consumer credit and other transactions for which CRA's have a "vital role" while, on the other hand, being "fair and equitable" to the consumer. Given the volume, and the computerized and electronic nature, of those transactions, the procedures employed by CRA's are necessarily implemented by computerized algorithms and other complex business processes. Further complicating the challenge of devising

uniform, nationwide procedures which comply with the numerous mandates of the FCRA is the inherent vagueness of much of the statutory language. Both the FTC, by its informal efforts to provide guidance (despite its lack of rulemaking authority), and Congress, by its express statements and its efforts to clarify the statute by later amendments, have noted the inherent (and perhaps unavoidable) vagueness of the FCRA.

Consistent with these practical realities which CRA's face and the legislative directive to balance the needs of commerce with consumer protection goals, the statute does not impose strict liability on CRA's for any particular transaction which results in an error or the mis-delivery of a consumer report. Only when a CRA is put on notice of a reported inaccuracy that is not later remedied is it subject to liability for a negligent violation of the FCRA under 15 U.S.C. § 1681o. Similarly, only when a CRA has received information inconsistent with the statutory "reason to believe" that a credit bureau customer has a permissible purpose to receive "consumer report" information is the CRA subject to liability under Section 1681o.

Therefore, the Ninth Circuit's ruling that defendants can be subject to statutory damages of $100 to $1,000 and punitive damages for procedures resulting from an "unreasonable" interpretation of the statute, *Reynolds*, 435 F.3d at 1099, is inconsistent with the statutory scheme as a whole. This Court should adopt the rulings of other appellate courts which have considered the issue, and which have held that liability for willful violations under Section 1681n. is appropriate only where the defendant knowingly violated the FCRA.

ARGUMENT

I. The Credit Bureau Industry Faces the Challenge of Establishing Uniform Nationwide Procedures which Comply with Numerous and Often Vague Duties Imposed on Consumer Reporting Agencies under the FCRA.

A. The FCRA requires CRA's to implement procedures which balance the competing statutory goals.

The FCRA is directed primarily at CRA's—not entities like the Petitioner insurance companies, which are users of consumer reports—and imposes both general and specific duties on CRA's to create and implement reasonable procedures. Indeed, as part of the "Congressional findings and statement of purpose," Congress expressly stated that the purpose of the FCRA was to require CRA's to adopt reasonable procedures which balance the needs of commerce with the rights of consumers:

> It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

15 U.S.C. § 1681(b).

Consistent with 15 U.S.C. § 1681(b), the FCRA contains general directives to CRA's to implement "procedures" which will serve the general statutory goals enumerated by the FCRA. A primary goal of the FCRA is to maximize the accuracy of the information reported by CRA's to its customers. *See* 15 U.S.C. § 1681(b). The FCRA imposes a general duty on CRA's to "follow reasonable procedures to assure maximum possible accuracy" of the information delivered in "consumer reports" subject to the FCRA. § 1681e(b). To serve the goals of "confidentiality" and "proper utilization" of information furnished by CRA's—in other words, privacy—the statute similarly requires CRA's maintain "reasonable procedures" designed "to limit the furnishing of consumer reports" to the permissible purposes listed in the FCRA. 15 U.S.C. § 1681e(a), *citing* § 1681b.

The Congressionally-required balancing of the needs of commerce with the rights of consumers means that CRA's must establish procedures that will efficiently facilitate transactions in which accurate and relevant consumer information is delivered only to entities which will use that information to establish a consumer's eligibility for credit, insurance, or employment. *See, e.g., Washington v. CSC Credit Servs.*, 199 F.3d 263, 266-67 (5th Cir. 2000) (reasonable procedures must balance needs of commerce with interests of consumers); *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972-73 (7th Cir. 2004) (more extensive procedures to verify the accuracy of information from reliable sources would result in increased cost to consumers), *citing Henson v. CSC Credit Servs.*, 29 F.3d 280, 285 (7th Cir. 1994). The FCRA, however, provides no guidance on how to properly balance these important interests in creating "reasonable procedures." 15 U.S.C. § 1681e(b).

Even when the FCRA provides some detail about the procedures that CRA's must employ, it leaves the

ultimate decision-making based on those procedures to the judgment of the CRA's. For example, the FCRA requires that CRA's conduct a "reasonable reinvestigation" of any information disputed by a consumer. 15 U.S.C. § 1681i(a)(1)(A). The FCRA provides some details about the required reinvestigation: a CRA must complete the reinvestigation within 30 days, § 1681i(a)(1)(A); it must convey the dispute to the furnisher of the disputed information within five days of receiving the dispute, § 1681i(a)(2)(A); it must either delete or modify any "inaccurate or incomplete" information based on the furnisher's response and any information submitted by the consumer, § 1681i(a)(5)(A); and it must notify the consumer of the results of the reinvestigation within five days of the completion of the reinvestigation, § 1681i(a)(6)(A).

Despite these details, however, the FCRA requires a CRA to use its judgment and discretion when reinvestigating disputed information. The FCRA ultimately places the duty to compare the separate information received from the consumer and the data furnisher and determine the accuracy of the information "squarely on" the CRA. *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993) ("In a reinvestigation of the accuracy of credit reports, a credit bureau must bear some responsibility for evaluating the accuracy of information obtained from subscribers."). As a first step, the CRA must determine what information the consumer is disputing. It must then decide what constitutes "all relevant information" that it must send to the source of the information, 15 U.S.C. § 1681i(a)(2)(A); evaluate whether the dispute is "Frivolous or Irrelevant," § 1681i(a)(3); and "review and consider all relevant information submitted by the consumer," § 1681i(a)(4). While the furnisher is required to provide information to the CRA as part of the reinvestigation, the CRA cannot simply rely on the information received from the furnisher

in response to the dispute, and may even be required to conduct an independent investigation. *See Henson*, 29 F.3d at 286-87 (to determine whether it has duty to go beyond the information provided by the furnisher, CRA must balance cost of verifying furnisher's information with possible harm to the consumer); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 225 (3rd Cir. 1997) (CRA cannot fulfill reinvestigation duties by "merely parroting information received from other sources"). Ultimately, the CRA must reconcile often conflicting information from consumers and data furnishers and determine the "appropriate" modification for any information that the CRA determines is inaccurate or incomplete. 15 U.S.C. § 1681i(a)(5)(A).

B. The "procedures" mandated by the FCRA are computerized algorithms and other business processes which must facilitate millions of real-time transactions.

Given the volume of information handled by CRA's, as well as certain specific mandates of the FCRA, the procedures implemented by CRA's must be automated.[4] Accordingly, CRA's, like Trans Union, have established computerized algorithms, business processes, and other procedures which must, in essence, apply Trans Union's interpretations of the FCRA to the delivery of hundreds of millions "consumer reports" each year.

For example, to comply with the mandate of 15 U.S.C. § 1681e(b) to ensure the accuracy of consumer reports, Trans Union's "procedures include collecting and storing individuals' names, addresses, social security

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[4] Automation serves the interests of commerce by providing affordable access to accurate, timely consumer credit information, which allows credit grantors to make better decisions.

numbers and birthdates, and then linking that information to individual 'trade lines of credit,' which are in turn compiled to generate credit reports." *Benson*, 387 F. Supp. 2d at 841. Only an automated process could perform these database-building activities with 2 billion/updates additions received from 85,000 data furnishers each month. *See id.*

To serve the statutory goal of only providing consumer reports for permissible purposes, and to provide the proper consumer's report, Trans Union designed and employs sophisticated computerized algorithms which match inquiry information from potential creditors to the consumer information in Trans Union's database. The match logic of these algorithms compares, on a real-time basis, the identifying information submitted by a potential creditor (*i.e.*, name, address, social security number, date of birth) and identifies the existing consumer credit files with similar identifying information to determine what electronic data relates to the consumer applying for credit. *See Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1062 (C.D. Cal. 1998) (describing Trans Union's proprietary procedures for selecting consumer files), *rev'd on other grounds*, 532 U.S. 902 (2001), *and aff'd in part, rev'd in part*, 289 F.3d 600 (9th Cir. 2001); *see also Crabill v Trans Union, L.L.C.*, 259 F.3d 662, 663-64 (7th Cir. 2001) (describing Trans Union's computer programs which select the correct consumer's information).

Indeed, the FCRA mandates automated procedures. The FCRA requires nationwide CRA's, like Trans Union, to provide an automated system to allow furnishers of consumer credit information to report the results of dispute investigations. 15 U.S.C. § 1681i(a)(5)(D). More than 83% of consumer disputes are currently processed electronically, and all disputes will be processed electronically in the future. FTC & Bd. of

Governors of the Fed. Reserve Sys., *Rep. to Cong. on the Fair Credit Reporting Act Dispute Process*, at 15-16 (citations omitted). The FCRA also mandates that "Nationwide Consumer Reporting Agencies" establish an automated "centralized source" to provide consumers with their free annual credit reports. 15 U.S.C. § 1681j(a).

C. The duties imposed on CRA's are vague.

The language of the FCRA which governs the conduct of CRA's is inherently vague. This fact further complicates the efforts of CRA's to establish uniform nationwide procedures which comply with the statute.

The Congress that passed the FCRA recognized the statute's essential vagueness. *See* 116 Cong. Rec. 36574-76 (Oct. 13, 1970). One congressman, who supported the bill, admitted that "there is considerable confusion about how this bill will be interpreted. The definitions are so vague that no one is certain what is included as a consumer credit report.'" *Id.* at 36576 (remarks of Rep. Brown). Another lamented that "[i]t really is unfortunate that we must legislate in such a manner that leaves so many questions unanswered." *Id.* at 36575 (remarks of Rep. Wylie).

The uncertainty surrounding the meaning of the FCRA is illustrated by the varying interpretations given to the single most fundamental provision of the FCRA: 15 U.S.C. § 1681a(d). This provision defines the term "consumer report," which is the statutory term for the information subject to the FCRA. Knowing what is and is not a "consumer report" is the cornerstone of CRA's efforts to comply with the statute as there is no liability under the FCRA for disclosing information that is not a statutory "consumer report." Conversely, information that is a "consumer report" is subject to the full panoply of duties and rights created by the statute.

The FCRA defines a "consumer report," in part, as:

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expect to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for –
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> (a) credit or insurance to be used primarily for personal, family, or household purposes;
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> (b) employment purposes; or
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> (c) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d)(1).[5]

As the Seventh Circuit has noted, by referencing the purposes for which a "consumer report" can be disclosed under 15 U.S.C. § 1681b, this definition of "consumer report" is circular. *Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 n.10 (7th Cir. 1988). In addition, the FCRA

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[5] The partial quotation from the statutory definition does not include the exclusions from the definition, many of which are counterintuitive. For example, under § 1681a(d)(2)(A)(iii), information that is a "consumer report" ceases to be a consumer report if it is communicated among corporate affiliates and the consumer has been given notice and the opportunity to prevent the communication. 15 U.S.C. § 1681a(d)(2)(A)(iii).

limits the definition of "consumer report" to only communication of information by a "consumer reporting agency," 15 U.S.C. § 1681a(d), but then defines "consumer reporting agency" as an entity that collects information "for the purpose of furnishing consumer reports," § 1681a(f).

Not surprisingly, courts have struggled to interpret the term "consumer report." Some courts found that information was not a "consumer report" unless the end-user of the information used it for a purpose specified by the FCRA, such as granting credit. *See Hovater v. Equifax, Inc.*, 823 F.2d 413, 417 (11th Cir. 1987); *Houghton v. New Jersey Manu. Ins. Co.*, 795 F.2d 1144, 1148 (3d Cir. 1986); *Cochran v Metropolitan Life Ins. Co.*, 472 F. Supp. 827, 831 (N.D. Ga. 1979); *Henry v. Forbes*, 433 F. Supp. 5, 9-10 (D. Minn. 1976). Other courts reached a different conclusion, finding that, regardless of the purpose for which the information was used, a "consumer report" existed if information was collected by the consumer reporting agency for a purpose specified by the FCRA. *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 885 (5th Cir. 1989); *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696 (10th Cir. 1980); *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978); *Boothe v. TRW Credit Data*, 523 F.Supp. 631, 634 (S.D. N.Y. 1981).

Indeed, one aspect of the decision below provides further evidence of the uncertainty of the term "consumer report." The statutory definition includes "any written, oral, or other communication" of information bearing on one of seven characteristics. 15 U.S.C. § 1681a(d); *Trans Union Corp. v. FTC*, 81 F.3d 228, 231 (D.C. Cir. 1996) (definition of "consumer report" in FCRA contains "seven enumerated factors"). According to the Ninth Circuit, this definition is so broad that it "unquestionably" includes a CRA's disclosure that is does *not* have any such

information about the consumer. *Reynolds*, 435 F.3d at 1093-94. In other words, according to the Ninth Circuit, a consumer report includes not only consumer creditworthiness information that a CRA has, *but also* information it does not have.

Just as Congress first acknowledged the ambiguity of the FCRA when it first enacted the statute (*see supra* p. 12), a quarter-century later Congress again conceded the original statutory vagueness. When it amended the FCRA in 1996, Congress recognized that certain amendments were necessary to address problems caused by confusion over existing provisions and technological advancements in the credit reporting industry:

> A number of problems in the FCRA's implementation and interpretation have arisen in the years since the law's enactment. Many of these problems are a result of *ambiguities in the statute*; other problems have arisen as the credit reporting industry has grown in the wake of *information technology advances* that have occurred over the last twenty years.

Report of the Committee on Banking, Housing and Urban Affairs, S. Rep. No. 104-185, at 18 (1995) (emphasis added).

To clarify the ambiguities in the FCRA, Congress in 1996 made several specific changes. For example, the originally-enacted FCRA was unclear on which date CRA's should use to calculate when derogatory credit information became obsolete. To ensure the timely removal of such information, Congress specified a standard "date of delinquency" used to calculate when information became obsolete. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, §2406(a)(b), 110 Stat. 3009-434 (1996), *codified at* 15 U.S.C. §

1681c(c)(1). The FCRA also originally provided that CRA's must disclose to a consumer the "nature and substance" of the information in their file for that consumer. *See* S. Rep. No. 104-185, at 41. Congress changed this provision to require disclosure of "all information" in a consumer's file to ensure that consumers received actual copies of their reports, which is consistent with the FTC's view that a consumer's "file" only encompasses information that a CRA provides to a third party in a consumer report. Pub. L. 104-208, §2408(a), 110 Stat. 3009-436, *codified at* 15 U.S.C. § 1681g(a)(1); 16 C.F.R. Pt. 600, App., § 603(g), No. 2. As part of the 1996 amendments Congress also codified (with some variance) the FTC interpretation of the FCRA which permitted CRA's to access credit report data to provide "prescreened" lists for the purpose of making unsolicited credit and other offers. *See* S. Rep. No. 104-185, at 36; 16 C.F.R. Pt. 600, App., §604(3)(A), No. 6. The 1996 amendments specifically identified "credit or insurance transactions that are not initiated by the consumer" as a permissible purpose. Pub. L. 104-208, §2404(a), 110 Stat. 3009-431–33, *codified at* 15 U.S.C. § 1681b(c).

D. There is little regulatory guidance regarding the FCRA duties imposed on CRA's.

Unlike many consumer protection statutes, or other statutes creating detailed regulatory schemes, there is little formal guidance available about the FCRA and no Federal agency has comprehensive rulemaking authority regarding the duties of CRA's. As originally enacted in 1970, although it did provide the FTC with enforcement authority, 15 U.S.C. § 1681s(a)(1), the FCRA did not provide the FTC with rulemaking authority. By the 1996 amendments, Congress made it clear that the FTC had no authority to issue regulations related to the FCRA. *See*

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, §2416(a)(2), 110 Stat. 3009-450 (1996).

While this provision was later removed, the FCRA currently authorizes the FTC to issue regulations only as to specific topics. *See, e.g.*, 15 U.S.C. § 1681a(q)(3) (authority to define "identity theft"); 15 U.S.C. § 1681m(d)(2)(B) (authority to dictate format, type size, and manner of presentation of address and telephone numbers on firm offers of credit); 15 U.S.C. § 1681m(e) (authority to issue regulations regarding identity theft). Much of this authority was added by the 2003 amendments to implement new provisions, many of which do not relate to CRA's or their pre-existing duties under the FCRA. *See, e.g.*, Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, §115(2), 117 Stat. 1990 (2003), *codified at* 15 U.S.C. § 1681m(e) (authority to issue regulations regarding identity theft); Pub. L. 108-159, §211(d), 117 Stat. 1972 (authority to issue regulations implementing the requirement to provide consumers with free annual consumer reports).

Shortly after the enactment of the FCRA in 1970, the FTC recognized the need to interpret the vague terms of the FCRA to help CRA's and other regulated entities comply with their legal obligations. Therefore, pursuant to its enforcement authority, the FTC issued "Statements of General Policy or Interpretation" in 1973. 16 C.F.R. Pt. 600; 88 F.R. 4945 (Feb. 23, 1973). The FTC amended and supplemented its interpretations over time, ultimately issuing in 1990 its "Commentary on the Fair Credit Reporting Act." 16 C.F.R. Pt. 600, App.; 55 F.R. 18808 (May 4, 1990). The FTC issued this nonbinding Commentary to "serve as guidance to consumer reporting agencies, their customers and consumer representatives." 16 C.F.R. §§ 600.1(b), 600.2(a). This Commentary, however, has not been updated since 1990, and it does not reflect the significant amendments to the FCRA in 1996

and 2003. Separately, while the FTC formerly issued nonbinding staff opinion letters answering questions about the application of the FCRA to particular fact scenarios, it has not done so since 2001.[6]

Therefore, there is no rulemaking or other administrative guidance which can mitigate the vagueness of many of the duties imposed by the FCRA.

II. The Statutory Framework of the FCRA Evidences an Intent to Subject a CRA to Statutory and Punitive Damages Only When the CRA Knows That its Conduct Violates the FCRA.

CRA's like Trans Union facilitate more than 1 billion transactions each year between individual consumers and credit grantors, insurers, and other entities with whom they seek to do business. It is well-established that this widespread availability of real-time consumer credit information provides significant benefits to United States consumers by allowing them easier access to less expensive credit.[7] Congress expressly found,

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[6] The FTC issued staff opinion letters until 2001, but has stated that "Except in unusual circumstances, the staff will no longer issue written interpretations of the FCRA." *See* <http://www/ftc/gov/os/statutes/fcrajump.htm> (providing access to copies of Staff Opinion Letters issued from 1997 through 2001).

[7] *See, e.g.*, Walter F. Kitchenman, *U.S. Credit Reporting: Perceived Benefits Outweigh Privacy Concerns*, The Tower Group, at 5 (Jan. 1999) (available at <http://www.privacyalliance.org/resources/kitcenman.pdf>). For example, United States consumers pay lower mortgage rates than consumers in Europe, yielding an estimated savings of $120 billion each year. *Id.* at 7; Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at 7 (available at <http://www.ftc.gov/bcp/workshops/infoflows/statements/cate02.pdf>); Fred H. Cate and

in enacting the FCRA, that CRA's perform a "vital" role in the U.S. economy. 15 U.S.C. § 1681(a)(3). Based on this vital role, and due to the enormous volume of data which is assembled and furnished by CRA's in consumer credit transactions, the FCRA does not make CRA's strictly liable for procedures which result in errors in consumer reports or in providing consumer reports to users who do not have a permissible purpose.

Even though the statute is designed to protect against such occurrences, the statutory scheme as a whole makes clear that only when a CRA has knowledge of facts which suggest, for example, an inaccuracy or lack of permissible purpose, is the CRA subject to a claim for a *negligent* violation of the FCRA. The standard necessary to establish a *willful* violation, and to subject defendants to statutory and punitive damages under 15 U.S.C. § 1681n(a) is, accordingly, significantly higher. Therefore, the Ninth Circuit's ruling that a willful violation of the FCRA can occur if a defendant interprets the FCRA in a way that is "unreasonable" or "creative," *Reynolds*, 435 F.3d at 1099, is inconsistent with the statutory framework, which as other Circuits have realized, requires knowledge that particular conduct is violative of the FCRA to establish a willful violation of the FCRA.[8]

Richard J. Varn, *The Public Record: Information Privacy and Access-A New Framework for Finding the Balance*, at 11 (1999).

[8] Other provisions of the FCRA use the term "knowing." Looking at the statute as a whole, however, it is clear that Congress has not carefully used the term "knowing" to have a precise, separate meaning different from "willful." The FCRA includes numerous "state of mind" words in the statute—malice, 15 U.S.C. § 1681h(e), knowingly, §§ 1681n(a)(1)(B), 1681n(b) willfully, §§ 1681n(a), 1681q, 1681r, pattern and practice, § 1681s(a)(2)(A), false pretenses, §§ 1681n(a)(1)(B), 1681n(b)—thereby suggesting that the use of one term rather than another has no particular significance. The overlap between the precise meaning of these terms is further

A. The FCRA is a comprehensive statutory scheme for regulating CRA's, and its civil liability provisions should be interpreted in a manner consistent with the statutory framework.

The level of knowledge and intent required to establish a willful violation of the FCRA under 15 U.S.C. § 1681n should not be viewed in isolation, or even in the context of an insurer's failure to provide adverse-action notices. Instead, because the FCRA represents a comprehensive scheme for regulating CRA's, the standard for establishing *negligent* violations of duties imposed on CRA's (under § 1681o) is relevant to determining the knowledge requirement for *willful* violations under § 1681n.

Federal courts have long recognized that the FCRA is a "comprehensive series of restrictions on the disclosure and use of credit information assembled by [CRA's]," as well as an "elaborate scheme for administrative enforcement of the FCRA." *FTC v. Manager Retail Credit Co.*, 515 F.2d 988, 989-90 (D.C. Cir. 1975); *see also Islam v. Option Mortgage Corp.*, 432 F.Supp.2d 181, 185 (D. Mass. 2006) (noting the FCRA's "elaborate regulatory structure"). Trans Union, like other CRA's, is "comprehensively regulated by the provisions of the FCRA." *FTC v. TRW, Inc.*, 628 F.2d 207, 208-09 (D.C. Cir. 1980).

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demonstrated by Congress' grouping of these terms together. *See, e.g.*, §§ 1681h(e) ("malice or willful intent"); §§ 1681n(a)(1)(B), 1681n(b) ("under false pretenses or knowingly"); §§ 1681q, 1681r ("knowingly and willfully"); § 1681s(a)(2)(A) ("knowing violation, which constitutes a pattern or practice"). In sum, it is fair to say that the FCRA does not use the terms "willful" and "knowing" in a way that would suggest an intended clear hierarchal "state of mind" requirement.

When examining another consumer-protection statute enforced by the FTC, this Court recognized that "strict construction" was not appropriate because "[w]e deal with remedial legislation of a regulatory nature where our task is to fit, if possible, all parts into an harmonious whole." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959) (Fur Products Labeling Act). Therefore, this Court read the disputed definition "hospitably with [the purpose of the act] in view." *Id.* This statutory construction principle is consistent with this Court's other decisions interpreting regulatory statutes. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

> The meaning or ambiguity of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole."

Id. at 132-33 (citations omitted). The Ninth Circuit failed to perform this statutory construction exercise, and essentially adopted a definition of "willful" under Section 1681n that merges the necessary distinction between "negligent" violations, which entitle consumers to "actual damages" and attorneys' fees, and "willful" violations, which subject CRA's to liability, including potential class action liability, for statutory damages of up to $1,000 per person, as well as punitive damages.

B. CRA's must have notice of a problem before liability under 15 U.S.C. § 1681o is established.

The FCRA does not impose strict liability on CRA's for conduct which results in inaccurate or mis-reporting of data, or other violations of the FCRA, and instead requires a showing of knowledge of a specific problem before liability under 15 U.S.C. § 1681o for a negligent violation is established.

The FCRA does not make CRA's strictly liable for reporting information that is found to be inaccurate. Instead, a CRA's duty is to maintain "reasonable procedures" to assure the accuracy of the information reported. 15 U.S.C. § 1681e(b); *see also Henson*, 29 F.3d at 284; *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991); *Crabill*, 259 F.3d at 663-64. Absent specific notice of an error in information that it receives, a CRA's duty to maintain reasonable procedures generally does not obligate it to investigate or verify the accuracy of the data reported to it. *Henson*, 29 F.3d 285-86. 15 U.S.C. § 1681e(b) "does not hold a [CRA] responsible where an item of information, received from a source that it reasonably believes is reputable turns out to be inaccurate, unless the [CRA] receives notice of systemic problems with its procedures." *Sarver*, 390 F.3d at 972, *citing* the FTC's 1990 Commentary, 16 C.F.R. Pt. 600, App., §607, No. 3.A. This rule makes practical sense. As the Seventh Circuit has observed:

> One can easily see how, even with safeguards in place, mistakes can happen. But given the complexity of the system and the volume of information involved, a mistake does not render the procedures unreasonable. . . In the absence of notice of prevalent unreliable information from a reporting lender, which would put [the

> CRA] on notice that problems exist, we cannot find that such a requirement to investigate would be reasonable given the enormous volume of information [the CRA] processes daily.

Sarver, 390 F.3d at 972.

Nor are CRA's strictly liable for disclosing consumer reports when the end user does not have a "permissible purpose" to obtain them. Instead, CRA's have only a duty to maintain "reasonable procedures to limit the furnishing of consumer reports" to the permissible purposes listed in 15 U.S.C. § 1681b. *See* 15 U.S.C. § 1681e(a). Consistent with that standard, the FCRA also provides that a CRA may furnish consumer reports to persons which the CRA "has reason to believe" intend to use the consumer reports for a permissible purpose. Moreover, if the CRA follows the basic procedures to obtain a user's certification of permissible purpose,[9] the CRA then has the statutory "reasonable grounds for believing" that the disclosure of a consumer report is for a permissible purpose under the FCRA. § 1681e(a). Unless the CRA actually knows that the consumer report is sought for an improper purpose, a CRA will not be liable for violations of the FCRA. *Boothe*, 557 F.Supp. at 71.

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[9] The FCRA requires that the prospective users identify themselves, certify the purpose for which the information is sought, and to certify that the consumer reports will not be used for another purpose. 15 U.S.C. §1681e(a). The CRA also is required to make a reasonable effort to verify the identity of new users and the uses for the information identified by them. §1681e(a).

C. The knowledge requirement for "negligent" FCRA liability mandates a standard for "willful" liability requiring proof of the defendant's knowledge of the violation of law.

The FCRA imposes differing civil liability on credit bureaus for violation of "any requirement" imposed by the federal statute, depending on the relative "state of mind" of the defendant. A negligent failure to comply with any of the numerous duties imposed upon credit bureaus entitles a consumer to "actual damages" and attorneys fees. 15 U.S.C. § 1681o(a). Nonetheless, as described above, the specific provisions of the FCRA which impose duties on credit bureaus do not create liability absent prior notice to the CRA of some problem with its procedures. Therefore, the express terms of the statute, *e.g.*, 15 U.S.C. §§ 1681e(a), 1681b(a)(3), and federal appellate court decisions interpreting these provisions, recognize a higher standard for negligent violation of the law as compared to traditional standards of common-law negligence.

Consistent with this statutory scheme, therefore, the ruling of the Ninth Circuit that conduct based upon an interpretation of the FCRA that is later deemed to be "unreasonable," *Reynolds*, 435 F.3d at 1099, is not consistent with the statutory scheme. As the majority of the Circuits which have examined the issue have ruled, a willful violation of the FCRA can only occur when the defendant knowingly violated its statutory obligations.

CONCLUSION

Indeed, if left undisturbed, the Ninth Circuit's standard could impose statutory and punitive damage liability for conduct that should not even give rise to negligent liability. Therefore, for the foregoing reasons, *amicus curiae* Trans Union LLC respectfully requests that this Court reverse the decision of the Court of Appeals and hold that a willful violation of the FCRA can only be established by a showing that the defendant knowingly violated the statute.

November 13, 2006

Respectfully Submitted

Michael O'Neil
Counsel of Record
Roger L. Longtin
Peter J. Donoghue
Albert E. Hartmann
DLA Piper US LLP
203 North LaSalle St.
Suite 1900
Chicago, IL 60601
312-368-4000

634D

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Nos. 06-84, 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE CO. OF AMERICA, *et al.*,
Petitioners,

v.

CHARLES BURR, *et al.*,
Respondents.

GEICO GENERAL INSURANCE CO., *et al.*,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: Nov. 13, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Amicus curiae addresses the following question only:

Whether the Ninth Circuit improperly expanded § 1681m of the Fair Credit Reporting Act by holding that an "adverse action" has occurred and notice is required thereunder, even when a consumer's credit information has had either no impact or a favorable impact on the rates and terms of the insurance that would otherwise have been offered or provided?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government.

In particular, WLF has regularly appeared in this and other federal courts to oppose unwarranted civil damage actions against those involved in the dissemination and use of consumer information. *See, e.g., Trans Union LLC v. Federal Trade Comm'n*, 245 F.3d 809 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 915 (2002). WLF also has published articles addressing some of the Fair Credit Reporting Act questions presented in this matter. *See, e.g.*, Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable*, WLF LEGAL BACKGROUNDER, Jan. 27, 2006, available at www.wlf.org/upload/012706LBDetlefsen.pdf.

WLF believes that the free and efficient flow of consumer information is vital to the health of the American economy. WLF is concerned that the Ninth Circuit's decision, if allowed to stand, will interfere significantly with that flow by increasing the costs of obtaining such information and by creating considerable uncertainty among users of such information regarding their obligations under the Fair Credit

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

Reporting Act (FCRA). WLF believes that as a result of the Ninth Circuit decision, consumers will be sent information that they neither want nor need, and the price of insurance will rise while its availability deceases.

WLF is filing this brief with the consent of all parties. Copies of the consent letters have been lodged with the Court.

STATEMENT OF THE CASE

Under the FCRA, a user of consumer reports must notify a consumer if the user "takes any adverse action with respect to [the] consumer that is based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a)(1). The FCRA defines an "adverse action" as, *inter alia*, "an increase in any charge for . . . any insurance." 15 U.S.C. § 1681a(k)(B)(i).

It is uncontested that Petitioner GEICO General Insurance Co. and related corporations (collectively, "GEICO") are "users of consumer reports."[2] Like virtually all insurance companies, GEICO uses credit information gleaned from consumer reports in pricing many of its products; it finds that doing so permits it to predict with a greater degree of accuracy the extent to which an insured is likely to make claims on his or her policy. It is also uncontested that when Respondent Ajene Edo applied for automobile insurance, GEICO considered Edo's credit score in the course of pricing his policy. The issue presented is whether GEICO should be

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[2] Because WLF is focusing on an issue raised only in *GEICO General Insurance Co. v. Edo*, No. 06-100, this brief does not discuss facts relevant to the consolidated case, *Safeco Insurance Co. of America v. Burr*, No. 06-84. All citations herein to the Petition Appendix ("Pet. App.") are to the appendix attached to the petition filed in No. 06-100.

deemed to have taken "adverse action" with respect to Edo when it offered him insurance.

In December 2000, Edo called GEICO and requested a rate quote for automobile insurance. After obtaining a "credit score" for Edo from a consumer reporting agency, GEICO offered Edo an insurance policy with its standard-rate company, GEICO Indemnity Co. – an offer that Edo accepted. GEICO determined that the rate offered to Edo (whose credit score was better-than-average) was no higher than the rate he would have received had his credit report not been taken into account. Pet. App. 14a. Based on that determination, GEICO concluded (in accordance with its then-standard policy for addressing "adverse action" issues) that it had not taken any "adverse action" with respect to Edo within the meaning of 16 U.S.C. § 1681a(k)(1)(B)(1). Accordingly, GEICO did not send Edo notice of an adverse action.

Edo thereafter filed a putative class action against GEICO under the FCRA. Edo alleged that various GEICO entities violated § 615(a) of the FCRA, 15 U.S.C. § 1681m(a), by failing to provide notice of adverse action taken against him. Edo alleged that the rate offered to him constituted "adverse action" because he would have been offered a lower rate if he had had the highest-possible credit score. Although Edo did not claim to have suffered injury, he claimed entitlement to statutory damages of $100 per class member plus attorney fees because, he alleged, GEICO's violation was "willful[]" within the meaning of § 616(a) of the FCRA, 15 U.S.C. § 1681n(a).

In February 2004, the district court granted summary judgment to all defendants and dismissed the action. Pet. App. 37a-48a. The district court ruled, *inter alia*, that GEICO Indemnity had not taken an "adverse action" against Edo

because "Plaintiff admits the premium charged to him by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history." *Id.* 46a.

The Ninth Circuit reversed. Pet. App. 1a-36a. It held that GEICO had, in fact, taken "adverse action" against Edo, stating:

> FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average customer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him.

Id. 20a-21a. The Ninth Circuit held that because Edo would have received a lower rate had he had the highest possible credit score, GEICO's rate quote constituted an adverse action and triggered § 1681m(a)'s notice requirement. *Id.* 21. After broadly defining what it means to "willfully" violate the FCRA notice requirement, the Ninth Circuit remanded the case to the district court for a determination of whether GEICO had "willfully" violated that requirement. *Id.* 30a-36a.

SUMMARY OF ARGUMENT

The Ninth Circuit's expansive definition of "adverse action" is inconsistent with both the structure and purpose of the FCRA. The appeals court based its definition on what it claimed was a straightforward understanding of the word

"increase";[3] it deemed a quoted rate an "increase[d]" rate if it was higher than the rate available to a person with a perfect credit score. Pet. App. 16a-17a, 20a-21. But the statute says no such thing. Indeed, although § 1681a(k)(1)(B)(i) uses the word "increase," it includes no benchmark reference whatsoever. That is, although the provision makes reference to an "increase" in insurance rates, it does not answer the question, "What is the rate from which an increase/decrease is to be measured?"

Although the failure to include language making explicit reference to such a benchmark creates a potential statutory ambiguity, an examination of the structure and purpose of the FCRA makes clear that the relevant benchmark rate is the rate an insurance applicant would have been charged had his or her credit score not been taken into account. Thus, an insurance applicant does not face "an increase in any charge" (and thus no "adverse action") if the quoted rate is the same or lower than the rate (s)he would have been charged had his or her credit score not been taken into account. Because GEICO quoted an insurance rate to Edo that was the same rate it would have quoted had it never consulted Edo's insurance score, GEICO did not take any adverse action and thus was under no obligation to notify Edo of any such adverse action.

When construing the responsibilities imposed by the FCRA on insurance companies and other users of consumer reports, it is important to bear in mind why Congress imposed such responsibilities. Congress was *not* responding to alleged irresponsible use of consumer reports by the business community. Rather, when it adopted the FCRA in 1970,

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[3] The FCRA defines an "adverse action" as including "an *increase* in any charge for . . . any insurance." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

Congress principal concern was to ensure the accuracy and fairness of reports issued by consumer reporting agencies. The FCRA imposed "adverse action" notification requirements on report users not because Congress deemed adverse actions to be in any way blameworthy, but because such notification would alert otherwise-unsuspecting consumers to negative information contained in those reports regarding their credit worthiness. Congress determined that if consumers were so informed, they would be in a position to contest negative credit information they deemed inaccurate and/or to take steps to rehabilitate their credit profile.

That legislative purpose indicates that Congress intended to impose notification requirements only when a consumer report user has acted in response to *negative* information contained in a report – otherwise, there is nothing in the report that needs to be "fixed." Yet, under the Ninth Circuit's interpretation, even consumers such as Edo who have good credit reports – just not as good a report as a multi-millionaire would have – must be sent "adverse action" notices any time they would have been quoted a lower insurance rate if they had had a perfect credit score. But a less-than-perfect credit score is no indication that one's file contains negative information; it may simply reflect that one is thrifty and has engaged in fewer credit transactions than creditors deem optimal. Under those circumstances, requiring consumer report users to provide "adverse action" notification serves none of Congress's intended purposes. If, alternatively, notification were required whenever consulting a consumer report results in an insurance rate quote that is higher than if no report had been consulted, Congress's purposes would be served – because under those circumstances it is highly likely that the report contains information that a reasonable consumer would deem "negative" and thus a cause for concern.

The improbability that Congress intended to require that "adverse action" notice be sent to millions of consumers with good credit is heightened when one considers the likely counter-productiveness of such notice. Consumers who receive such notices on a regular basis are likely to begin ignoring them, thereby potentially missing an opportunity to correct erroneous credit information. Alternatively, consumers with good credit who have received such notices may inaccurately conclude that their consumer reports contain negative information and may refuse business requests for permission to run a credit check, a refusal that almost surely would be against their financial interest.

The *structure* of the FCRA also supports the conclusion that insurers are not required to provide "adverse action" notice unless negative information in a consumer report caused them to quote a higher rate than they would have quoted had they not consulted the report. As noted above, the FCRA imposed the notification requirement not as a means of inhibiting companies from taking adverse actions against consumers, but as a means of alerting consumers that their credit reports contain negative information. Accordingly, there is no reason to conclude that Congress would impose stricter notification requirements on one industry than on another, because Congress's purpose (alerting consumers) is identical with respect to all users of consumer reports, regardless what industry they might happen to be in. Congress recently adopted the Fair and Accurate Credit Transactions Act of 2003 (FACTA), 108 Pub. L. 159, 117 Stat. 1952 (2003), to amend the FCRA to clarify that a provider of credit who runs a credit check on a consumer need not provide FCRA notice unless the use of credit information results in an offer of credit with terms that are "materially less favorable then the most favorable terms available to a substantial portion of [the company's] consumers." The Ninth Circuit's standard – which requires

that notice be sent to all but a small minority of insurance consumers with the very best credit scores – is wholly inconsistent with the FACTA standard. There is no plausible reason to suppose that Congress intended to impose so much stricter notification requirements on the insurance industry when notice from insurers and notice from creditors serve an identical congressional purpose: to alert consumers to negative credit information.

The Ninth Circuit's standard is also inconsistent with the commonly understood meaning of an "adverse" action. Certainly, the average person would not think that she has been treated "adverse[ly]" simply because it is theoretically possible that she could have received better treatment, if she nonetheless has been treated as well or better than the typical person in the large group of which she is a member. Indeed, when this Court has used the phrase "adverse action," as it has done with some frequency in connection with employment discrimination law, it has never used it in the manner that the Ninth Circuit has attributed to Congress in connection with the FCRA.

Finally, the legislative history of the FCRA is consistent with the understanding that GEICO did not take any "adverse action" with respect to Edo. An explicit definition of "adverse action" was not added to the FCRA until 1996; but nothing in the pre-1996 statutory language or committee reports supports the Ninth Circuit's view that Congress intended to require notice to consumers who, like Edo, were not disadvantaged by any the information contained in their credit reports.

ARGUMENT

I. THE NINTH CIRCUIT'S EXPANSIVE DEFINITION OF "ADVERSE ACTION" IS INCONSISTENT WITH THE STRUCTURE AND PURPOSE OF THE FCRA

The FCRA defines an "adverse action" as including "an increase in any charge for . . . any insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). The Ninth Circuit concluded that an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score." Pet. App. 20a. The appeals court said that conclusion was mandated by the plain meaning of the word "increase," which "means to make something greater." *Id.* 16a (citing four dictionary definitions of the word "increase"). The court said that the rate offered to Edo was an "increase" over the rate he would have been offered if he had a perfect credit score – and thus that GEICO was required to send Edo an "adverse action" notice by virtue of § 1681m(a), which requires such notice when a person takes any "adverse action" with respect to a consumer that is "based in whole or in part on any information contained in a consumer report." *Id.* 20a-21a.

But that construction of § 1681a(k)(1)(B)(i) required the Ninth Circuit to read into the statute words that simply are not there. In particular, the statute does not state that the rate an insurance applicant "would have been offered if he had a perfect credit score" is the benchmark against which an "increase" is to be measured. Indeed, the statute includes no benchmark reference whatsoever. That is, although the statute makes reference to an "increase" in insurance rates, it does not answer the question, "What is the rate from which an increase/decrease is to be measured."

The failure to include language making explicit reference to such a benchmark creates a potential ambiguity in the meaning of § 1681a(k)(1)(B)(i). However, any ambiguity is eliminated when one considers the "adverse action" issue in light of the overall structure and purpose of the FCRA. As this Court has explained, "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). A reviewing court should not "confine itself to examining a particular statutory provision in isolation," because "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

An examination of the structure and purpose of the FCRA makes clear that the relevant benchmark rate, for purposes of § 1681a(k)(1)(B)(i), is the rate an insurance applicant would have been charged had his or her credit score not been taken into account. Thus, an insurance applicant does not face "an increase in any charge" (and thus no "adverse action") if the quoted rate is the same or lower than the rate (s)he would have been charged had his or her credit score not been taken into account. Because GEICO quoted an insurance rate to Edo that was the same rate it would have quoted had it never consulted Edo's insurance score, GEICO did not take any adverse action and thus was under no obligation to notify Edo of any such adverse action.[4]

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[4] WLF takes no position on an issue raised below but not at issue before this Court: whether an insurance company can ever be said to (continued...)

A. Congress's Purposes in Adopting the FCRA Indicate that the Ninth Circuit Chose an Inappropriate Benchmark for Determining Whether There Has Been an "Increase" in a Charge for Insurance

Congress's purposes in adopting the FCRA are set forth in 15 U.S.C. § 1681:

> **(a) Accuracy and fairness of credit reporting.** The Congress makes the following findings:
>
> (1) The banking system is dependent upon fair and accurate reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
>
> (2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
>
> (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

---

[4](...continued)
have undertaken "an increase in any charge for . . . any insurance" within the meaning of § 1681a(k)(1)(B)(i), when a new insurance policy is at issue and the company has never previously quoted a rate to the customer. Given that the issue is not directly raised, WLF urges the Court to avoid expressing a view on the issue in its decision. Indeed, in light of the huge potential liability facing insurance companies from suits alleging willful failure to provide "adverse action" notices, WLF urges the Court to limit its ruling regarding what constitutes an "adverse action" to the precise issue raised by GEICO.

> (4) There is a vital need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and with respect for the consumer's right to privacy.
>
> **(b) Reasonable procedures.** It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

As § 1681 makes clear, the FCRA was adopted for the principal purpose of regulating the conduct of credit reporting agencies, not the conduct of companies that use data supplied to them by credit reporting agencies. Congress mandated that consumer reporting agencies adopt "reasonable procedures" designed to ensure the accuracy and fairness of their reports. Requirements imposed by the FCRA on report users must be viewed in that light: the purpose of those requirements was to assist in the effort to improve the accuracy and fairness of reports, not to limit users' rights to draw adverse inferences from the reports. The FCRA imposed "adverse action" notification requirements on report users not because Congress deemed adverse actions to be in any way blameworthy, but because such notification would alert otherwise-unsuspecting consumers to negative information contained in those reports regarding their credit worthiness. Congress determined that if consumers were so informed, they would be in a position to contest negative credit information they deemed inaccurate and/or to take steps to rehabilitate their credit profile. *See generally, TRW, Inc. v. Andrews*, 537 U.S. 19, 23 (2001); S.

Rep. 91-517 (Nov. 5, 1969) at 1-2 ("The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report. . . . [T]he consumer has a right to know when he is being turned down for credit, insurance, or employment because of adverse information in a credit report and to correct any erroneous information in his credit file.").

That legislative purpose presupposes, then, that the information that consumers have a right to see is *negative* information for which consumers might have reason to seek correction. As the Senate Committee on Banking and Currency explained the legislative concern that Congress sought to address in adopting the "adverse action" notification requirement:

> One problem which the hearings on S. 823 identified is the inability at times of the consumer to know he is being damaged by an adverse credit report. Standard agreements between credit reporting agencies and the users of their reports prohibit the user from disclosing the contents of the report to the consumer. In some cases, the user is even precluded from mentioning the name of the credit reporting agency. Unless the person knows he is being rejected for credit or insurance or employment because of a credit report, he has no opportunity to be confronted with the charges against him and tell his side of the story.

Id. at 3.

Neither the statutory language nor the FCRA's legislative history suggests that Congress sought to require that consumers be notified regarding innocuous information to which they are extremely unlikely to object – such as that the

consumer is not a multi-millionaire. Yet, the Ninth Circuit's definition of "adverse action" will require just such notifications. According to the Ninth Circuit, even consumers such as Edo who have good credit reports – just not as good a report as a multi-millionaire would have – must be sent "adverse action" notices any time they would have been quoted a lower insurance rate if they had had a perfect credit score. But a less-than-perfect credit score is no indication that one's file contains negative information; it may simply reflect that one is thrifty and has engaged in fewer credit transactions than creditors deem optimal. Under those circumstances, requiring consumer report users to provide "adverse action" notification serves none of Congress's intended purposes.

The benchmark proposed by GEICO – that the "adverse action" notification requirement is not triggered unless information contained in a consumer report causes an insurance rate to "increase" above the rate that would have been charged if no report had been consulted – is far more consistent with the purposes Congress sought to achieve by imposing that requirement. Under those circumstances, it is far more likely that the report contains information that a reasonable consumer would deem "negative" and thus a cause for concern. Moreover, the proposed benchmark – the rate that would have been charged if no report had been consulted – is not some "made up" number with no basis in reality. Rather, as the Ninth Circuit recognized, GEICO does in fact compute a "'neutral' credit weight" that is used in determining insurance rates for many of its customers. Pet. App. 13a.[5] Accordingly, by calculating an insurance rate for a customer

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[5] In particular, GEICO applies the "neutral" credit weight to all customers in those States that prohibit or restrict the use of customer-specific credit reports in calculating insurance rates. The "neutral" credit weight is in essence the average credit rating of all consumers.

that takes into account the customer's credit score, and then recalculating an insurance rate for the customer using a "neutral" credit weight, companies such as GEICO can quickly determine whether use of the credit score has caused the insurance rate to be higher than it would have been had no credit report been consulted. Sending "adverse action" notices to customers falling within that category provides notice to the very consumers whom the FCRA was intended to protect.

The evidence is overwhelming that adopting the Ninth Circuit's interpretation of "adverse action" will result in "adverse action" notices being sent to millions of consumers with very good credit scores. At many insurance companies, fewer than 15% of insureds receive the best rate available. *See* Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance,* Apps. C & D (2002). No doubt some of the 85% of consumers who are quoted higher rates fail to qualify for the best rate for reasons unrelated to their credit score. But those figures nonetheless underscore the anomaly of the Ninth Circuit's decision: it will result in millions of consumers being "alerted" to non-existent credit problems, a result not contemplated or intended by the FCRA. Indeed, such "false alarms" are likely to be counter-productive. Consumers who receive such notices on a regular basis are likely to begin ignoring them, thereby potentially missing an opportunity to correct erroneous credit information. As the Federal Trade Commission has acknowledged, "[I]f you give notices too widely and in too many circumstances, then it . . . becomes something that people ignore." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs,* 198th Cong. 95-96 (2003) (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, U.S. Federal Trade Comm'n).

Moreover, other consumers who receive such notices may erroneously conclude that there really is something wrong with their credit rating. They may respond by refusing business requests for permission to run a credit check. For Edo and many other consumers with above-average credit scores, efforts to prevent business from learning their credit scores could only work to their financial disadvantage.

In sum, the interpretation of § 1681a(k)(1)(B)(i) adopted by the Ninth Circuit is implausible because it runs counter to the essential purpose of the FCRA: to alert consumers whenever negative information in their credit histories is interfering with their ability to obtain insurance. Indeed, by requiring "adverse action" notices to be sent in millions of instances in which no such negative information exists, the Ninth Circuit is undermining the purpose of the notice requirement by discouraging appropriate action by those whose reports really do contain negative information.

B. The Ninth Circuit's Decision Is Inconsistent with the Structure of the FCRA, Which Indicates an Intent to Impose Similar Notification Requirements on All Users of Consumer Reports, Without Regard to the Industry Involved

The *structure* of the FCRA also supports the conclusion that insurers are not required to provide "adverse action" notice unless negative information in a consumer report caused them to quote a higher rate than they would have quoted had they not consulted the report.

The FCRA requires users of consumer reports in a wide variety of industries to notify consumers whenever information contained in a report leads the user to treat the consumer less favorably. Users explicitly named in the FCRA include those

using consumer reports in connection with insurance underwriting decisions (§ 1681a(k)(1)(B)(i)); hiring and other employment-related decisions (§ 1681a(k)(1)(B)(ii)); granting license benefits (§ 1681(a)(k)(1)(B)(iii)); and extending credit (§ 1681a(k)(1)(A). The FCRA also includes a miscellaneous category that extends "adverse action" notification requirements to anyone using credit reports in connection with an action taken or determination made in response to any "application," "transaction," or "review of an account" initiated by a consumer. *See* § 1681a(k)(1)(B)(iv).

But as noted above, Congress did not impose these notification requirements as a means of inhibiting users of consumer reports from taking adverse actions against consumers. Rather, the purpose of such notification requirements was *precisely the same* with respect to all the various types of users covered by the FCRA: to alert consumers that their credit reports contain negative information, thereby giving those consumers an opportunity to respond appropriately to the source of the consumer report. 15 U.S.C. § 1681(a) & (b). Because Congress's purpose (alerting consumers) is identical with respect to all users of consumer reports, there is no reason to expect that Congress would impose stricter notification requirements on one industry than on another. Rather, one would expect that the level of "negativity" required to trigger a notification requirement would be relatively uniform from industry to industry. The Ninth Circuit's decision is inconsistent with this basic structure of the FCRA because it would impose much stricter notification requirements on the insurance industry than on providers of credit.

It is important to recognize that when the FCRA was adopted in 1970, the principal use of consumer reports was to determine whether to do business with a consumer at all, not

to determine pricing. Thus, although pricing issues have always been subject to the FCRA, Congress was focused primarily on refusals to deal when it drafted the FCRA. *See, e.g.*, S. Rep. 91-517 (1969) at 1 (purpose of legislation was to ensure notification of the individual "whenever an individual is *rejected* for credit, insurance or employment because of an adverse credit report.") (emphasis added). In the ensuing years, there was some uncertainty regarding when providers of credit were required to provide notice of "adverse action" in cases in which they did not altogether refuse to extend credit. By at least 1996, it had been clearly established that the "adverse action" notification requirements were not triggered in at least one such circumstance: when a consumer applies for credit under one set of terms, a credit provider (after consulting a credit report) responds by offering credit on less generous terms, and the consumer accepts the counteroffer.[6]

Finally, Congress sought to provide further clarification with respect to notice requirements imposed on providers of credit that use consumer reports, by adopting FACTA in 2003. FACTA amends the FCRA to clarify that a provider of credit who runs a credit check on a consumer need not provide FCRA notice unless the use of credit information results in an offer of credit with terms that are "materially less favorable than the most favorable terms available to a substantial portion of [the company's] consumers." 15 U.S.C. § 1681m(h)(1).[7]

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[6] That position was set forth in regulations adopted by the Federal Reserve under the Equal Credit Opportunity Act ("ECOA"). 12 C.F.R. § 202.2. The FCRA was then amended in 1996 to make clear that, with respect to providers of credit, "adverse action" was defined by reference to the definition in § 701(d)(6) of the ECOA, 15 U.S.C. § 1691(d)(6). *See* 15 U.S.C. § 1681a(k)(1)(A).

[7] Technically, the notification requirement imposed by § 1681m(h)(1) is separate from and in addition to "adverse action"

(continued...)

In other words, Congress has clarified that a provider of credit is not required to notify a consumer simply because, based on his or her credit score, the consumer was offered credit terms that are not the absolutely best terms the provider of credit ever offers. Rather, notice is required only when the terms offered are "materially less favorable" than terms that are regularly offered to substantial numbers of other customers.

Because pricing issues have arisen less frequently in the insurance context, Congress has not had occasion to provide further clarification regarding when an insurance company's variable pricing policy triggers § 1681m(a)'s "adverse action" notification requirements. Nonetheless, for all the reasons stated above, there is no reason to conclude that Congress intended to impose significantly more onerous notification requirements on the insurance industry than on providers of credit. Were FACTA's rationale applied in this case, there can be no doubt that GEICO would not be required to provide "adverse action" notice to Edo: Edo may not have been quoted insurance rates that were as favorable as those that would have been offered to a multi-millionaire with an identical driving record, but the more favorable terms were not "materially" so and were not available to a "substantial" portion of GEICO's customers.

In contrast, applying the Ninth Circuit's definition of "adverse action" – which requires that notice be sent to all but

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[7](...continued)
notification requirements imposed on credit providers (and all other users of consumer reports) by § 1681m(a). However, the language and history of FACTA indicate that a credit provider that complies with the § 1681m(h)(1) notification requirement will also be deemed to have complied with the § 1681m(a) notification requirements.

a minority of insurance consumers with the very best credit scores – is wholly inconsistent with FACTA's rationale.

There is no plausible reason to suppose that Congress intended to impose so much stricter notification requirements on the insurance industry when notice from insurers and notice from creditors serve an identical congressional purpose: to alert consumers to negative credit information contained in consumer reports. We recognize that FACTA was not adopted until 2003, well after the FCRA imposed "adverse action" notification requirements on insurers and well after the events giving rise to this lawsuit. Nonetheless, given the history and structure of the FCRA and that FACTA was widely understood as a clarification of existing requirements, there is every reason to consider the FACTA amendments when determining what "adverse action" notification requirements Congress intended to impose on insurers. As this Court has explained, "[I]t is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, *even those subsequently enacted.*" *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 786 (2000) (emphasis added).

The Ninth Circuit's decision is also inconsistent with another important aspect of the FCRA's overall structure. The FCRA requires that users taking "adverse actions" on the basis of information contained in consumer reports must provide consumers with:

(1) notice of the adverse action;

(2) the name, address, and telephone number of the consumer reporting agency that furnished the consumer report, and a statement that the consumer reporting agency cannot explain why adverse action was taken

> because it was the user, not the agency, that took the adverse action; and
>
> (3) notice of the consumer's right to obtain a free copy of the consumer report and to dispute, with the consumer reporting agency, the accuracy or completeness of information contained in the consumer report.

15 U.S.C. § 1681m(a).

But the Ninth Circuit attempted to impose additional reporting requirements on insurers, beyond those explicitly required by the statute. Under the guise of interpreting what it means to provide "notice" of the adverse action, the appeals court held that insurers were also required to "describe the [adverse] action, specify the effect of the action upon the consumer, and identify the parties or parties taking the action." Pet. App. 24a.[8] The court simply made up out of whole cloth its requirement that the notice "specify the effect of the action on the consumer." The only requirement included in the statute is that the insurer must provide "notice" – which cannot reasonably be interpreted to mean anything more than a statement that, based on information in the consumer report, the insurer has decided to "increase" the charge for insurance. Such notice is fully adequate to serve the FCRA's purpose: to put consumers on notice that there is negative information in their consumer reports that they may wish to investigate.

It is not difficult to discern why the Ninth Circuit may have felt compelled to make up additional notification

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[8] In requiring that the party or parties taking the action be identified, the Ninth Circuit made clear that when a family of insurance companies was involved in the transaction, the notice must specify the role played by each corporate entity. *Id.* 26a.

requirements. Given that the Ninth Circuit's holding will require that "adverse action" notices be sent to millions of consumers with excellent credit whose consumer reports contain no "negative" information, the Ninth Circuit undoubtedly realized that notices that did no more than track the requirements of § 1681m(a) would lead to mass confusion among consumers. The court apparently hoped to lessen that confusion by imposing additional notice requirements on the user, such as that the user "specify" the effect of the action on the consumer.[9]

The Ninth Circuit's perceived need to make up additional notification requirements suggests that Congress had something entirely different in mind when it defined "adverse action." That Congress required little more by way of notice than a simple "notice of adverse action," § 1681m(a)(1), is a strong indication that Congress contemplated that notice would be required only in those instances in which the "adverse" nature of the action taken would be readily apparent to all. GEICO's suggested interpretation of "adverse action" is consistent with that congressional intent; the Ninth Circuit's is not.

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[9] In imposing that requirement, the Ninth Circuit appears to have had in mind something like, "Your credit score was a good one. As a result, we are quoting you an insurance rate that is less than that charged someone with a driving record similar to yours but with only an average credit score. Nonetheless, we are hereby giving you notice that we took 'adverse action' against you in the sense that your quoted rate would have been lower if you had had a 'perfect' credit score, a score achieved by only a small minority of consumers."

C. The Ninth Circuit's Definition of "Adverse Action" Is Inconsistent with the Commonly Understood Meaning of that Phrase

The Ninth Circuit's ruling is also inconsistent with the commonly understood meaning of an "adverse" action. Something is deemed "adverse" if it is "hostile," "opposed to one's interests," or "unfavorable." G. & C. Merriam Co., *Webster's New Collegiate Dictionary* (1981). Those are not words that spring to mind when an insurance company offers a rate that is not its best but is nonetheless better-than-average. It is hard to imagine that Congress would have used the word "adverse" in the FCRA in describing a concept that was intended to apply to as broad an array of insurance company actions as was specified by the Ninth Circuit.

Certainly, the average person would not think that she has been treated "adverse[ly]" simply because it is theoretically possible that she could have received better treatment, if she nonetheless has been treated as well or better than the typical person in the large group of which she is a member. An applicant for insurance can in some ways be analogized to a college applicant. If Stanford University offers admission and a substantial achievement-based scholarship to a high school valedictorian, no one using normal parlance would think that Stanford has taken an "adverse action" with respect to that student because others (*e.g.*, star athletes or those from impoverished backgrounds) are offered all-expenses-paid scholarships. To the contrary, most such valedictorians would consider themselves to have received favorable treatment, particularly when compared to students who received no financial aid or were rejected for admission. WLF respectfully submits that it is equally implausible that Congress would have described analogous conduct by insurance companies as "adverse action."

Indeed, when this Court has used the phrase "adverse action," as it has done with some frequency in connection with employment discrimination law, it has never used it in the manner that the Ninth Circuit has attributed to Congress in connection with the FCRA. For example, the court regularly uses the phrase "adverse employment action" as shorthand for the types of employer actions that can be the subject of lawsuits alleging a violation of Title VII or other anti-discrimination statutes.[10] In using that phrase (or similar phrases including the word "adverse"), the Court has never intended to suggest thereby that an employer's conduct is actionable any time that it subjects the plaintiff-employee to anything less than optimal treatment. Rather, the Court has reserved the phrases "adverse action" and "adverse employment action" for situations in which the employer's conduct materially affects the employment relationship. Thus, for example, the Court held recently in *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2408, 2415 (2006), that an employer does not violate 42 U.S.C. § 2000e-3(a) – which forbids an employer from "discriminating against" an employee or job applicant for participating in a Title VII proceeding against the employer – unless the employer engages in "adverse action" sufficient to dissuade a "reasonable worker from making or supporting a charge of discrimination." The Court explained that minor harms – "normal petty slights, minor annoyances, and simple lack of good manners" – do not meet that standard and thus are not actionable. *Id.* at 2415. Federal courts have been using the phrase "adverse action" in the employment context since before the FCRA was adopted by Congress in 1970. *See, e.g.,*

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[10] *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 523-24 (1993) (Title VII permits damage awards "against employers who are proven to have taken *adverse employment action* by reason of race.") (emphasis added).

Pauley v. United States, 419 F.2d 1061, 1065 (7th Cir. 1969) (the plaintiff's transfer from an office in Chicago to an office in Washington was not sufficiently negative to constitute "adverse action" under federal civil service law, and thus did not trigger the plaintiff's right to a hearing). That understanding of the phrase "adverse action" is in sharp contrast to the understanding of the Ninth Circuit, which interpreted Congress's use of the phrase to encompass any insurance rate quote that is higher than the rate offered to those with *perfect* credit scores. WLF respectfully submits that when Congress used the phrase "adverse action" in the FCRA, it is far more likely that Congress intended that phrase to be interpreted as it is interpreted by federal courts in the employment discrimination context and in everyday usage, than that it intended an interpretation akin to the Ninth Circuit's in this case.

II. THE LEGISLATIVE HISTORY OF THE FCRA CONFIRMS THAT GEICO DID NOT TAKE ANY "ADVERSE ACTION" WITH RESPECT TO EDO

Because the purpose and overall structure of the FCRA are sufficient to demonstrate that the Ninth Circuit has misconstrued the meaning of the FCRA, there is no need to proceed further and examine the statute's legislative history. But such an examination would only confirm that the Ninth Circuit erred in its interpretation.

Prior to 1996, the FCRA did not include a definition of "adverse action," even though that phrase appeared in § 1681m(a). The pre-1996 version of that section, which set forth the notice obligations of users of consumer reports, provided as follows:

> Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or *the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report* from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

15 U.S.C. § 1681m(a) (1995) (emphasis added).

This pre-1996 version of the law is no more susceptible to the Ninth Circuit's interpretation than is the current version. The provision referred to an "increase" in the charge for insurance, but it includes no benchmark for determining whether the charge has been increased or decreased. For all the reasons articulated above in connection with the current version of the FCRA, there is no basis for concluding that the pre-1996 version intended to require notification for consumers whose rates were no higher than if their consumer reports had not been consulted.

In his Ninth Circuit brief, Edo sought to rely on House and Senate reports from the early 1990s that stated that the "adverse action" notification requirements should be read broadly. Appellant's Opening Ninth Circuit Br. 43. WLF notes initially that those reports were issued in connection with proposed legislation that was never enacted. More importantly, Edo's argument misconstrues what Congress was attempting to accomplish in the early 1990s. The authors of those reports were not seeking to broaden the "adverse action" notification requirements as they applied to insurance companies and providers of credit. Rather, they were reacting

negatively to a 1990 Federal Trade Commission (FTC) determination that those requirements did not apply outside the areas of credit, insurance, or employment. In May 1990, an FTC commentary had held:

> The [FCRA] does not require that a [consumer] report user provide any notice to consumers when taking adverse action not relating to credit, insurance, or employment. For example, a landlord who refuses to rent an apartment to a consumer based on credit or other information in a consumer report need not provide the notice. Similarly, a party that uses credit or other information in a consumer report as a basis for refusing to accept payment by check need not comply with this section. Checks have historically been treated as cash items, and thus such refusal does not involve a denial of credit, insurance, or employment.

FTC Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18804, 18826 (May 4, 1990, codified at 16 C.F.R. Part 600).

One apparent purpose of the 1996 amendments to the FCRA was to overturn that restrictive feature of the May 1990 commentary. The Consumer Credit Reporting Act of 1996 (CCRA), P.L. 104-208, included as part of its newly added section defining "adverse action," a provision defining "adverse action" in connection with miscellaneous business activities. *See* 15 U.S.C. § 1681a(k)(1)(B)(iv). Accordingly, such activities as renting apartments and deciding whether to accept checks from consumers are now subject to the FCRA's "adverse action" notification requirements. But nothing in either the CCRA or any of the congressional reports preceding adoption of the CCRA gives any indication that Congress intended the CCRA to expand the scope of the "adverse

action" notification requirements that had previously been imposed on insurance companies.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court reverse the decision of the court of appeals.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302

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